

Title: William Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al., Petitioners

v.

A-1 Contractors and Lyle Stockert

Docketed:
May 21, 1996

Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	May 16 1996	Petition for writ of certiorari filed. (Response due June 20, 1996)
	Jun 20 1996	Brief of respondents A-1 Contractors, et al. in opposition filed.
	Jul 2 1996	DISTRIBUTED. September 30, 1996
	Jul 12 1996	Reply brief of petitioners Strate, Assoc. Judge, et al. filed.
	Sep 23 1996	Supplemental brief of petitioners filed.
	Oct 1 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply.
		SET FOR ARGUMENT January 7, 1997.

	Nov 12 1996	Joint appendix filed.
	Nov 12 1996	Brief of petitioners William Strate, Associate Tribal Judge, et al. filed.
	Nov 12 1996	LODGING consisting of twelve copies of a Grant of Easement for Right-of-Way for ND Highway 8, and a map prepared by the BIA and ND Highway Dept. showing the Hwy. 8 crossing trust land on Fort Berthold Reservation
	Nov 12 1996	Brief amici curiae of Shakopee Mdewakanton Sioux (Dakota) Community, et al. filed.
	Nov 12 1996	Brief amicus curiae of Northern Plains Tribal Judges Association filed.
	Nov 12 1996	Brief amici curiae of Assiniboine and Sioux Tribes of Fort Peck Reservation, et al filed.
	Nov 12 1996	Brief amicus curiae of United States filed.
	Nov 12 1996	Brief amici curiae of Yavapai-Apache Nation, et al. filed.
	Nov 25 1996	CIRCULATED.
	Dec 3 1996	Record filed.
	Dec 4 1996	Record filed.
	Dec 9 1996	Brief of respondents A-1 Contractors and Lyle Stockert filed.
	Dec 9 1996	Brief of Council of State Governments, et al. filed.
	Dec 10 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 10 1996	Brief amici curiae of American Trucking Associations, Inc.,

Entry Date

Proceedings and Orders

et al. filed.

Dec 10 1996	Brief amici curiae of Montana, et al. filed.
Dec 10 1996	Brief amici curiae of Lake County, Montana, et al. filed.
Dec 16 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 27 1996	Reply brief of petitioners William Strate, et al. filed.
Jan 7 1997	ARGUED.

No. 95

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In The OFFICE OF THE CLERK
Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge
of the Tribal Court of the Three Affiliated
Tribes of the Fort Berthold Indian Reservation;
THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES
OF THE FORT BERTHOLD INDIAN
RESERVATION; LYNDON BENEDICT FREDERICKS; KEN-
NETH LEE FREDERICKS; PAUL JONAS
FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS
FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the rule of *Montana v. United States*, 450 U.S. 544 (1981), that the inherent sovereign civil jurisdiction of Indian tribes over the activities of non-Indians has been generally and implicitly divested, to a question of tribal court jurisdiction over an action between two non-Indians arising on a state highway crossing Indian reservation land held in trust by the federal government for the Tribe, rather than applying the rule of *Iowa Mutual Ins. Co. v LaPlante*, 480 U.S. 9 (1987), that Tribes have retained their civil jurisdiction over non-Indian activities on Indian land unless that jurisdiction has been expressly limited by treaty provision or federal statute?

2. Assuming *arguendo* that the *Montana* rule applies, does the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation nevertheless have civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the Tribe, against a non-Indian contractor that has a sub-contract with a tribal corporation to perform work on the Reservation, to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing tribal trust land on an Indian reservation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Proceedings in the Tribal Courts and in the Federal District Court	5
C. Proceedings in the United States Court of Appeals for the Eighth Circuit	7
1. The Three Judge Panel	7
2. The <i>En Banc</i> Court	7
REASONS FOR GRANTING THE WRIT	8
1. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE ON INDIAN LAND WITHIN AN INDIAN RES- ERVATION	8

TABLE OF CONTENTS - Continued

	Page
2. THE COURT OF APPEALS' <i>EN BANC</i> MAJOR- ITY OPINION CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVER- EIGNTY OVER THE ACTIONS OF NON- INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS	11
3. THE COURT OF APPEALS' <i>EN BANC</i> MAJOR- ITY OPINION CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE APPLICATION OF THE PRE- CEDENTS OF THIS COURT REGARDING TRIBAL COURT JURISDICTION OVER CIVIL ACTIONS AGAINST NON-INDIANS ARISING ON INDIAN LAND WITHIN AN INDIAN RES- ERVATION	13
4. ASSUMING <i>ARGUENDO</i> THAT THE MONTANA "TRIBAL INTEREST TEST" APPLIES TO DETER- MINE TRIBAL JURISDICTION IN THIS CASE, THE <i>EN BANC</i> MAJORITY MISCONSTRUED THAT TEST	15
A. The <i>en banc</i> majority erred in its construction of the "consensual relationship" exception	16
B. The <i>en banc</i> majority erred in its construction of the "direct effect" exception	18
CONCLUSION	21
Appendix A: Majority and Dissenting Opinions of the <i>En Banc</i> United States Court of Appeals for the Eighth Circuit	App. 1
Appendix B: Order Granting Rehearing <i>En</i> Banc	App. 49

TABLE OF CONTENTS - Continued

	Page
Appendix C: Majority and Dissenting Opinion of the Three Judge Panel of the United States Court of Appeals for the Eighth Circuit.....App.	50
Appendix D: Memorandum and Order of the United States District Court of North Dakota.....App.	73
Appendix E: Opinion of the Northern Plains Intertribal Court of Appeals....App.	87
Appendix F: Memorandum Opinion of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation.....App.	101

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brendale v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	9, 11
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987).....	9
<i>Davis v. Director, North Dakota Department of Transport</i> , 467 N.W.2d 420 (N.D. 1991).....	9, 12
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990), <i>cert. denied</i> , 499 U.S. 943 (1991).....	17
<i>Hinshaw v. Mahler</i> , 42 F.3d 1178 (9th Cir. 1994), <i>cert. denied</i> , 115 S.Ct. 485 (1994).....	13, 14, 15
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	8, 10, 12, 13, 14
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	8
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	<i>passim</i>
<i>National Farmers Union Insurance Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985).....	13
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).....	13
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993).....	9, 11
<i>U.S. ex rel., Morongo Band of Mission Indians v. Rose</i> , 34 F.3d 901 (9th Cir. 1994).....	14
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832).....	8

TABLE OF AUTHORITIES - Continued

	Page
TREATIES AND STATUTES	
Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749.....	4
18 U.S.C. § 1151.....	3, 9
25 U.S.C. § 323.....	2, 4, 9
25 U.S.C. §§ 450-450n.....	5
25 U.S.C. §§ 461-479.....	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331.....	6

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Honorable William Strate, Associate Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation and the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, respectfully pray that a Writ of *Certiorari* issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on February 16, 1996.



OPINIONS BELOW

The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals for the Eighth Circuit, entered February 16, 1996, are reported at 76 F.3d 930, available on Westlaw, and reprinted in the Appendix (hereinafter "App.") hereto at pages App. 1 through App. 48. The order granting rehearing *en banc* entered on January 9, 1995 is reprinted at App. 49. The opinion and dissenting opinion of the three judge panel of the Court of Appeals, entered November 29, 1994 and vacated by the granting of rehearing *en banc*, are reprinted at App. 50 through App. 72. The District Court's memorandum and order, entered September 16, 1992, are unpublished and reprinted at App. 73 through App. 86. The opinion of the Northern Plains Intertribal Court of Appeals, dated January 8, 1992 is unpublished and reprinted at App. 88 through App. 100. The memorandum opinion and order of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, filed on September 4,

1991, is unpublished and reprinted at App. 101 through App. 109.

JURISDICTION

Rehearing *en banc* by the Court of Appeals for the Eighth Circuit was granted by order of January 9, 1995. The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals were entered on February 16, 1996. This petition for writ of *certiorari* is filed on May 16, 1996, within 90 days of February 16, 1996.

This Court has jurisdiction to review the final *en banc* judgment of the Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out verbatim as follows:

A. 25 U.S.C. § 323. Rights-of-way for all purposes across any Indian lands:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in

New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

B. 18 U.S.C. § 1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

A. Introduction

On November 9, 1990, there was a traffic accident on North Dakota Highway 8 within the exterior boundaries of the Indian Reservation of the Three Affiliated Tribes of Fort Berthold (hereinafter "the Tribe").¹ Highway 8 is

¹ The Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) are a federally-recognized Indian tribe which exercises its sovereignty under a federally-approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479. The Tribe is located on the Fort Berthold

situated on a federal right-of-way on land held by the federal government in trust for the Tribe.² The accident involved two non-Indians: Gisela Fredericks, a Reservation resident for over 40 years and the wife of tribal member Kenneth Fredericks (now deceased); and, Lyle Stockert, an employee and part owner of A-1 Contractors, a non-Indian subcontracting company located off the Reservation.

At the time of the accident, Lyle Stockert was driving a company gravel truck. A-1 Contractors was working on the Reservation under a construction subcontract entered into on the Reservation with LCM Corporation. LCM Corporation is wholly owned by the Tribe. Under the subcontract, A-1 Contractors did excavating, berming, and recompacting in connection with the construction of a tribal community building. All of A-1 Contractors' work under the subcontract was performed within the boundaries of the Reservation.

Indian Reservation in what is today west central North Dakota pursuant to the Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749, with the United States. When created in 1851, the Reservation was about 13.5 million acres. Successive federal acts have reduced it to its present size of about 1 million acres. About 415,000 of those acres are held by the federal government in trust for the Tribe or tribal members. About 3,000 acres are privately owned by Indians in fee simple status. About 339,000 acres are owned in fee by non-Indians. Over 150,000 acres are other federal lands, and another 9,000 acres are owned by the state or the six counties which lie in whole or in part within the Reservation.

² The right-of-way was granted on May 8, 1970 pursuant to the Rights-of-way Across Indian Lands Act of 1948, 25 U.S.C. § 323.

B. Proceedings in the Tribal Courts and in the Federal District Court

Mrs. Fredericks and her five adult children, who are enrolled members of the Tribe³ (hereinafter collectively referred to as "the Fredericks"), sued Lyle Stockert and A-1 Contractors (hereinafter collectively referred to as "A-1")⁴ in Tribal Court⁵ for damages for injuries allegedly sustained in the accident as a result of their negligence. Mrs. Fredericks sought \$1,000,000 for her personal injuries and medical expenses. Her children sought \$1,000,000 for loss of consortium.

³ The Tribe has about 9,100 members. About 3,300 of them live within the exterior boundaries of the Reservation. About 2,400 non-members, including non-Indians, also live within the Reservation's exterior boundaries.

⁴ Also named, but later dismissed, was Continental Western Insurance Company, A-1's insurer on the subcontract activities. A punitive damages claim was dismissed when the insurance company was dismissed.

⁵ The Tribe has operated a court system as the judicial branch of its government since 1969. The court system receives federal funding (about \$300,000 per year) under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n. The Tribe contributes an additional \$50,000 per year. The court system operates under a written law and order code. At present there are four law trained judges and one magistrate who has had training but is not a law graduate. In 1995 the court system handled 1,901 criminal cases and 397 civil cases, forty-one percent (41%) of which involved non-Indians. Appeals from the Tribal Court may be taken to the Northern Plains Intertribal Court of Appeals, which also receives funding under the Indian Self-Determination and Education Assistance Act.

A-1 moved to dismiss the action for lack of jurisdiction under federal law. The Tribal Court held that it had jurisdiction under federal law over Mrs. Fredericks' action.⁶ (App. 106). The Northern Plains Intertribal Court of Appeals affirmed and remanded the case to the Tribal Court for further proceedings. (App. 97). No further proceedings have occurred against A-1 in this case in Tribal Court since the remand.

Under 28 U.S.C. § 1331, A-1 sought declaratory and injunctive relief from tribal jurisdiction in the federal district court for North Dakota. In addition to the Fredericks, the Tribal Court and the Tribal Court Judge (hereinafter collectively referred to as "the Tribal Defendants") were named as defendants. The Tribal Defendants waived their immunity and consented to suit for the limited purpose of defending the federal law claims against tribal jurisdiction in this case.

On cross-motions for summary judgment, the Honorable Patrick A. Conmy denied A-1's motion and granted the Fredericks' and Tribal Defendants' motions. (App. 82).⁷

⁶ The Tribal Court expressly declined to reach or express any opinion as to its jurisdiction over the consortium claims by Mrs. Fredericks' children. (App. 107). No other court has reached this issue in this litigation.

⁷ The district court noted that tribal court jurisdiction was not exclusive, implying concurrent jurisdiction with the state courts. (App. 82). While never an issue in this case, the Tribe has never claimed that it has exclusive jurisdiction over the action.

C. Proceedings in the United States Court of Appeals for the Eighth Circuit

1. The Three Judge Panel

A-1 appealed to the Court of Appeals for the Eighth Circuit.⁸ A three judge panel ruled 2-1 in favor of tribal court jurisdiction over Mrs. Fredericks' action. The majority opinion was authored by Judge McMillian and joined by Judge Floyd R. Gibson. Judge Hansen dissented.

2. The *En Banc* Court

The *en banc* Court of Appeals ruled 8-4 against tribal court subject matter jurisdiction under federal law over Mrs. Fredericks' action. Judge Hansen authored the majority opinion which was joined by Chief Judge Richard S. Arnold, and Judges Fagg, Bowman, Wollman, Magill, Loken, and Morris Shepard Arnold. Judges McMillian, Floyd R. Gibson, Beam, and Murphy dissented. Judge Beam wrote a concurring and dissenting opinion and Judges Gibson and McMillian wrote dissenting opinions. All four dissenting Judges joined each of the dissenting opinions.

⁸ The issue of personal jurisdiction of the Tribal Court over A-1 was raised in and reached by the Tribal Court (App. 106), the Tribal Court of Appeals (App. 88), and the federal district court. (App. 82). All of these courts found that the Tribal Court has personal jurisdiction over A-1. Before the Court of Appeals, A-1 raised only the issue of subject matter, not personal, jurisdiction. (App. 2).

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE ON INDIAN LAND WITHIN AN INDIAN RESERVATION

Two lines of this Court's cases set forth different rules for determining whether an Indian tribe has civil jurisdiction over the activities of non-Indians within the boundaries of an Indian reservation. The *Iowa Mutual*⁹ rule presuming tribal jurisdiction derives from this Court's earliest federal Indian law cases, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), and finds its most recent expression as follows:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149, n.14.

Iowa Mutual, 480 U.S. at 18 (some citations omitted).

⁹ *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (hereinafter "the *Iowa Mutual* rule").

The *Montana*¹⁰ rule presuming divestment of tribal jurisdiction stems from *Montana* and its progeny, *Brendale*¹¹ and *Bourland*.¹² It states that tribes have been generally and implicitly divested of their inherent sovereign jurisdiction over the activities of non-Indians. This presumption against tribal jurisdiction can be defeated by either of two exceptions set out in *Montana* in the so-called "tribal interest test," discussed *infra* pp. 15-20.

Significantly, the *Montana* cases all involved challenges to tribal authority over the activities of non-Indians on formerly tribal land that has been alienated pursuant to congressional legislation which broadly opened such land for non-Indian ownership or occupation. But lower courts have questioned whether the *Montana* rule also applies to cases that arise on Indian land¹³

¹⁰ *Montana v. United States*, 450 U.S. 544 (1981), (hereinafter "the *Montana* rule").

¹¹ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

¹² *South Dakota v. Bourland*, 508 U.S. 679 (1993).

¹³ In this Petition, the term "Indian land" is used to mean land in which the Tribe or tribal members have an interest. It does not include land owned in fee by non-Indians or land alienated from Indian title by Congress. As noted above, the state highway in this case runs through the Reservation pursuant to a federal right-of-way granted under 25 U.S.C. § 323. The highway here is clearly Indian land under North Dakota law, *Davis v. Director, North Dakota Dep't of Transp.*, 467 N.W.2d 420, 422 (N.D. 1991) (hereinafter "Davis"), and under federal law. See 18 U.S.C. § 1151, as construed in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

within a reservation, and if so, how such an application can be reconciled with the *Iowa Mutual* rule.

This case exemplifies the lower courts' confusion. The federal district court applied the *Iowa Mutual* rule. (App. 82-83). The *en banc* majority reversed and held that this case is governed by the *Montana* rule. (App. 24). Three of the dissenting appeals court judges believe that the *Montana* rule is limited to instances of non-Indian activity on non-Indian fee lands. *E.g.*,

I believe that the analysis and underlying rationale set forth in *Montana* have no relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians. As such, I would limit the rule of that case to its facts and rely instead on the broad scope of inherent tribal sovereignty outlined in cases such as *Iowa Mutual*. . . .

(App. 32) (Floyd R. Gibson, J., dissenting) (citation omitted); and McMillian, J., in dissent, "I would apply *Montana*, and its exceptions, only to fee lands owned by non-tribal members." (App. 39). They recognize that if *Montana* is not so limited, it is inconsistent, if not unreconcilable, with the *Iowa Mutual* rule. Even the *en banc* majority concedes that "some of the language from *Iowa Mutual* . . . can be viewed in isolation to create tension with *Montana*." (App. 18).

This case presents the opportunity for this Court to clarify the application of its federal Indian law precedents. It is, moreover, an opportunity to settle the merits of an issue which impacts the rights of tribes nationwide and innumerable parties who reside on, do business on, or visit Indian reservations. It is a matter of broad public

importance. Indeed, as the *en banc* majority aptly admits, this case presents an issue which "is largely unresolved and [which] has generated a great deal of interest and commentary." (App. 8).

2. THE COURT OF APPEALS' EN BANC MAJORITY OPINION CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVEREIGNTY OVER THE ACTIONS OF NON-INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS

The *en banc* majority's error in analyzing tribal jurisdiction in this case stems largely from a misunderstanding of *Montana*, *Brendale*, and *Bourland*. Those cases contained three essential elements. First, they all involved land taken from a tribe by Congress for non-Indian ownership or occupation.¹⁴ Second, the Court in those cases found that the conduct of the non-Indians on the fee or taken land posed no threat to the welfare of a tribe. Third, the cases all involved a conflict between a tribe and a state or federal agency over competing regulatory jurisdiction.

None of these elements is present here. First, the accident occurred on Indian land within the continuing

¹⁴ *Montana*, of course, also involved Indian land upon which this Court upheld tribal regulation of the activities of non-Indians. "The Court of Appeals held that the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . and with this holding we can readily agree." 450 U.S. at 557.

jurisdiction of the Tribe. See *Davis, supra*, at n.13. Second, as pointed out by Judge Floyd R. Gibson, tribes have a significant interest in dealing "with non-tribe members who happen to wreak havoc on tribal lands." (App. 32). Third, this case presents no conflict whatever between competing claims of a tribe and a state over jurisdiction. As noted earlier, the Tribe here claims only concurrent jurisdiction with the state over Mrs. Fredericks' action.¹⁵

By applying the *Montana* rule to this case, the *en banc* majority has effected an unprecedented extension of that rule to Indian land. To compound its error, the majority announces a new rule regarding tribal jurisdiction over non-Indian activities on a reservation by reading the *Iowa Mutual* rule

together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(App. 18). This rule cannot be reconciled with the *Iowa Mutual* rule. Indeed, the Court of Appeals' new rule converts the *Iowa Mutual* rule into a subtest of the *Montana* rule – a rule incompatible with these cases as well as with other opinions of this Court.

¹⁵ The courts of the State of North Dakota accord comity to the enforcement of tribal court judgments. *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.* 462 N.W.2d 164, 167-168 (N.D. 1990).

For example, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers*). In *National Farmers*, a tribal member was allegedly injured on a reservation by a non-Indian. The non-Indian, faced with a lawsuit in tribal court, asked this Court to extend the general and implicit divestment rule regarding tribal criminal jurisdiction over non-Indians, announced in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to the civil arena. This Court declined to do so and held that tribal adjudicatory jurisdiction over reservation-based civil actions involving non-Indians has not been generally and implicitly divested. *National Farmers*, 471 U.S. at 855-856. Relying on *Montana*, the majority below here ignores *National Farmers* and makes the precise argument rejected there into a rule of law. "*Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. . . ." (App. 13).

The majority opinion below is a gross distortion of both the *Montana* rule and the *Iowa Mutual* rule. Only this Court can now ensure that this critical jurisdictional issue is properly understood and applied.

3. THE COURT OF APPEALS' EN BANC MAJORITY OPINION CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE APPLICATION OF THE PRECEDENTS OF THIS COURT REGARDING TRIBAL COURT JURISDICTION OVER CIVIL ACTIONS AGAINST NON-INDIANS ARISING ON INDIAN LAND WITHIN AN INDIAN RESERVATION

In *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994); cert. denied 115 S.Ct.485, (1995) (*Hinshaw*), a case very similar

to this one, the Court of Appeals for the Ninth Circuit upheld tribal court jurisdiction under federal law. In *Hinshaw*, two non-Indians were involved in a traffic accident on a federal highway running through an Indian reservation. The accident resulted in the death of one of the non-Indians. Although both non-Indians were reservation residents, neither were tribal members. The mother of the deceased, who is a tribal member, brought various tort claims against the surviving non-Indian in tribal court.¹⁶

The *Hinshaw* court's analysis of tribal jurisdiction is relevant here. The Ninth Circuit applied the *Iowa Mutual* rule, not the *Montana* rule. The Ninth Circuit found that under the *Iowa Mutual* rule and in the absence of an expressly limiting federal law, the tribal court retained jurisdiction to hear the case. *Hinshaw*, 42 F.3d at 1181; see also *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994), where the Ninth Circuit observed in a contract action by a non-Indian against a tribal member that, "[s]trictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land." 34 F.3d at 906.

The *en banc* majority's analysis and result in this case is clearly contrary to *Hinshaw*. The majority admits as

¹⁶ While the plaintiff in *Hinshaw* was a tribal member, her cause of action was derivative, brought in a representative capacity on behalf of the nonmember son. *Hinshaw*, 42 F.3d at 1180-1181. If the tribal court would not have had jurisdiction to hear the deceased son's case, it could not have heard the mother's derivative action.

much, stating that "[t]o the extent that *Hinshaw* supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it." (App. 19). This Court should now accept this opportunity to resolve the conflict between the Eighth and Ninth Circuits on this important issue.

4. ASSUMING ARGUENDO THAT THE MONTANA "TRIBAL INTEREST TEST" APPLIES TO DETERMINE TRIBAL JURISDICTION IN THIS CASE, THE EN BANC MAJORITY MISCONSTRUED THAT TEST

Montana does not hold that tribal jurisdiction over the activities of non-Indians has been completely divested. The *Montana* tribal interest test sets forth two instances where tribes have such jurisdiction:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-566 (citations omitted). All four dissenting judges would uphold tribal jurisdiction in this case under both the consensual relationship and the direct effect exceptions.

A. The *en banc* majority erred in its construction of the "consensual relationship" exception

It is undisputed that the subcontract between A-1 and the Tribe's corporation is a "consensual relationship." The *en banc* majority nevertheless believes that this subcontract is insufficient to sustain tribal jurisdiction over Mrs. Fredericks' action against A-1. The majority reasons that this is because "[t]he dispute in this case is . . . not a dispute arising under the terms of, out of, or within the ambit of the 'consensual agreement,' *i.e.*, the subcontract between the tribes and A-1. Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident." (App. 21).

The dissenting judges correctly recognize that *Montana* does not so limit the meaning of "consensual relationship." Rather, *Montana* holds simply that a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565. Hence, the Tribe here has jurisdiction over civil actions arising on the Reservation and involving A-1 whether those actions are over the terms of the subcontract or not. Simply put, but for the subcontract, Mrs. Fredericks' injuries might not have occurred. As Judge Floyd R. Gibson states, "[This case] arose as a direct result of A-1's commercial consensual

contacts with the tribe. . . . I . . . fail to see any other plausible explanation as to why a gravel truck owned by A-1 . . . was on tribal land at the time of the collision." (App. 33).

Other courts agree with the dissent. For example, in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1996), *cert. denied*, 499 U.S. 943 (1991), a non-Indian business located on non-Indian fee land within an Indian reservation objected to tribal regulation of its employment practices. In arguing against the existence of a "consensual relationship," the business asserted that its connections with the Tribe, although substantial, were not sufficiently related to employment to justify the regulation at issue. The Court of Appeals found that no such direct correlation was required. Based on various agreements and dealings between the business and the Tribe, the court held that the business had "subjected itself to the civil jurisdiction of the Tribes." 905 F.2d at 1315, *citing Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) (upholding a tribe's jurisdiction to impose health regulations on a non-Indian grocery store located on non-Indian fee lands within a reservation).

This Court needs to clarify that the majority below erred in limiting tribal jurisdiction under *Montana* to disputes over the subject matter or terms of a consensual relationship between a non-Indian and an Indian.

B. The *en banc* majority erred in its construction of the direct effect exception

All of the dissenting judges would find a direct effect on the Tribe's political integrity and welfare in this case. That effect stems primarily from the Tribe's sovereign interest in providing a forum to resolve civil disputes arising on its Reservation. Judge Beam writes that "[a] legitimate judicial system arise as a result of sovereignty;" (App. 25), and "[o]ne of the strongest interests that the tribe advances in this case is its interest in providing a forum for this plaintiff." (App. 28). Judge Floyd R. Gibson states:

[T]he power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power. As Chief Justice Marshall observed:

No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 387-88 (1821).

(App. 31-32). Judge McMillian agrees:

The tribe also has an interest in affording those who have been injured on the reservation with a

judicial forum. . . . [D]isregarding the jurisdiction of tribal courts, which play a vital role in tribal self-government, undermines their authority over reservation affairs and to that extent imperils the political integrity of the tribe.

McMillian (App. 48).

The Tribe also has an interest in ensuring safety on its highways on its Reservation. As Judge McMillian observes, "the allegedly tortious conduct of A-1 and Stockert occurred on a state highway right-of-way on the reservation. This conduct by non-Indians within the reservation threatened the tribe's interest in the safe operation of motor vehicles on the roads and highways on the reservation." (App. 47-48). This interest is heightened where, as here, the injuries are allegedly caused by entities the Tribe has employed to work on public projects on the Reservation, and the injuries are to residents of the Reservation who are closely related to tribal members. As Judge Floyd R. Gibson notes:

[T]he majority opinion also unfairly discounts the effect of A-1's conduct on the health and welfare of the tribe. While the immediate victim of the collision . . . is not a member of the tribe, she is nonetheless a longtime resident of the reservation whose husband and adult children are enrolled tribal members. To claim that A-1's conduct on tribal land had no effect on the health or welfare of the tribe is simply unrealistic and not in accordance with the facts.

(App. 34).

Finally, the dissents take issue with the majority's view that under *Montana*, a tribe or tribal member must be a party to a tribal court action for there to be tribal court jurisdiction. Judge Beam believes that *Montana* makes clear that non-Indians alone can significantly impact tribal interests:

[*Montana*] fully recognized that non-Indians and nonmembers can affect the political integrity, economic security, health and welfare of a tribe under the proper circumstances. The *Montana* Court's establishment of two tribal jurisdiction "exceptions" and its refusal to wholly extend its holding in *Oliphant* to civil jurisdiction demonstrates the Court's cognizance of the influence of non-Indians and tribal real estate on tribal self-government.

(App. 27-28) (footnote omitted).

The opportunity to provide a forum for the civil resolution of claimed injuries arising on its Reservation is all the Tribe here seeks. This Court should now correct the majority below's failure to acknowledge that this issue in this case indeed directly affects the Tribe.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* to review the *en banc* judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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May 16, 1996

TABLE OF CONTENTS

	Page
Appendix A: Majority and Dissenting Opinions of the <i>En Banc</i> United States Court of Appeals for the Eighth Circuit.....	App. 1
Appendix B: Order Granting Rehearing En Banc	App. 49
Appendix C: Majority and Dissenting Opinion of the Three Judge Panel of the United States Court of Appeals for the Eighth Circuit	App. 50
Appendix D: Memorandum and Order of the United States District Court of North Dakota.....	App. 73
Appendix E: Opinion of the Northern Plains Intertribal Court of Appeals.....	App. 87
Appendix F: Memorandum Opinion of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation.....	App. 101

App. 1

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 92-3359

A-1 Contractors; Lyle Stockert,	*
Appellants,	*
v.	*
Honorable William Strate,	*
Associates Tribal Judge of the	*
Tribal Court of the Three	*
Affiliated Tribes of the Fort	*
Berthold Indian Reservation;	*
Three Affiliated Tribes of the	*
Fort Berthold Indian Reservation,	*
The Tribal Court; Lyndon	*
Benedict Fredericks; Kenneth Lee	*
Fredericks; Paul Jonas	*
Fredericks; Hans Christian	*
Fredericks; Jeb Pius Fredericks;	*
Gisela Fredericks,	*
Appellees.	*

Appeal from the
United States
District Court for
the District of
North Dakota.

Submitted: May 23, 1995

Filed: February 16, 1996

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

HANSEN, Circuit Judge.

In this case, we are asked to decide whether an American Indian Tribal Court has subject matter jurisdiction over a tort case which arose out of an automobile accident which occurred between two non-Indian parties on an Indian reservation. A divided panel of this court previously concluded that the Indian tribe retained the inherent sovereign power to allow the tribal court to exercise subject matter jurisdiction over the dispute. After granting the suggestion of A-1 Contractors and Lyle Stockert to rehear this case en banc, we vacated the panel opinion. We now hold that the tribal court does not have subject matter jurisdiction over the dispute.

I.

On November 9, 1990, on a state highway on the Fort Berthold Indian Reservation in west-central North Dakota, a gravel truck owned by A-1 Contractors and driven by Lyle Stockert (an A-1 employee) and a small car driven by Gisela Fredericks collided. Mrs. Fredericks suffered serious injuries and was hospitalized for 24 days. A-1 is a non-tribal company located in Dickinson, North Dakota. Stockert is not a member of the tribe and resides in Dickinson, North Dakota. Mrs. Fredericks is not a

member of the tribe; however, she resides on the reservation, she was married to a tribal member (now deceased), and her adult children are enrolled members of the tribe.

At the time of the accident, A-1 was working on the reservation under a subcontract agreement with LCM Corporation, a corporation wholly owned by the tribe. Under the subcontract, A-1 performed excavating, berming, and recompacting work in connection with the construction of a tribal community building. A-1 performed all of the work under the subcontract within the boundaries of the reservation. The record is not clear whether Stockert was engaged in work under the contract at the time of the accident.¹

In May 1991, Mrs. Fredericks sued A-1, Stockert, and Continental Western Insurance Company (A-1's insurer), in the Tribal Court for the Three Affiliated Tribes² of the Fort Berthold Indian Reservation. Mrs. Fredericks' adult children also filed loss of consortium claims as part of the suit. Mrs. Fredericks and her adult children sought damages in excess of \$13 million for personal injury, loss of consortium, and medical expenses.

¹ There is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident. The district court made its fact-findings based on the pleadings in this case, not upon the evidence.

² The Three Affiliated Tribes - Mandan, Hidatsa, and Arikara - are federally recognized Indian tribes which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

A-1, Stockert, and Continental Western made a special appearance in tribal court and moved to dismiss the Frederickses' suit, contending that the tribal court lacked personal and subject matter jurisdiction. The tribal court denied the motion and found that it had personal and subject matter jurisdiction over the suit brought by Gisela Fredericks. *Fredericks v. Continental Western Ins. Co.*, No. 5-91-A04-150, slip op at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991). Specifically, the tribal court found that it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because A-1 had "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also concluded that it had subject matter jurisdiction over the action because its inherent tribal sovereignty had not been limited by treaty or federal statute. *See id.* at 1.24(d). Given the tribal court's conclusion that it had jurisdiction over the claims of Gisela Fredericks, the tribal court did not reach the question of its jurisdiction over the consortium claims brought by her children, who were tribal members.

A-1, Stockert, and Continental Western appealed to the Northern Plains Intertribal Court of Appeals. The Intertribal Court of Appeals affirmed the tribal court and remanded the case to the tribal court for further proceedings. *Fredericks v. Continental Western Ins. Co.*, Northern Plains Intertribal Ct. App. 1 (Jan. 8, 1992). The Intertribal Court of Appeals took a broad view of the tribe's civil authority over the non-Indians involved in this dispute:

Like any sovereign, Three Affiliated Tribes has [sic] an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction.

Slip op. at 7. Continental Western was dismissed from the case without prejudice pursuant to an agreement of the parties.

Before proceedings resumed in the tribal trial court, A-1 and Stockert filed this case in the United States District Court for the District of North Dakota against Mrs. Fredericks and her children (hereinafter "the Frederickses"), the Honorable William Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court itself. A-1 and Stockert sought injunctive and declaratory relief. They asked the district court to declare that the tribal court had no jurisdiction over this matter, to enjoin the Frederickses from proceeding against them in the tribal court, and to enjoin the tribal judge and the tribal court (hereinafter the "tribal defendants") from asserting jurisdiction over them.

The tribal defendants initially raised the affirmative defense of sovereign immunity, but subsequently consented to the suit for the limited purpose of defending the federal law claims for injunctive relief. Both sides filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied the summary judgment motion of A-1 and Stockert, and it granted the summary judgment motions of the Frederickses and the tribal defendants. *A-1 Contractors v. Strate*, Civil No. A1-92-94 (D.N.D. Sept. 17, 1992). The district court

decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation, which was irrelevant to the issue of tribal court jurisdiction. *Id.* at 4-5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, and concluded that Indian tribes have retained inherent sovereignty to exercise jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute. *Id.* at 9-10. The district court found that there was no treaty or statute that limited the tribe's jurisdiction in this case. *Id.* at 10. A-1 and Stockert appealed on the issue of subject matter jurisdiction over the claims of Mrs. Fredericks.³

A panel of this court affirmed the district court in a two-to-one decision. *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994). A-1 and Stockert requested review of the panel's decision en banc. We granted their request, vacated the panel opinion, and set this case for rehearing en banc.

II.

We review de novo the district court's decision both granting and denying summary judgment. *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992). We agree with the district court that this case presents no relevant

³ The consortium claims of Mrs. Fredericks' adult children are not a part of this appeal because neither the tribal courts nor the federal district court addressed the tribal courts' jurisdiction over those claims.

factual disputes for our review. The only question presented, whether the tribal court has jurisdiction over this dispute, is a question of law. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

The specific question presented for our resolution is whether the tribal court has civil jurisdiction over this dispute which arose between two non-Indian parties on the Fort Berthold Reservation. A-1 and Stockert argue that under Supreme Court case law, the tribe does not have the inherent sovereign authority to exercise civil jurisdiction over non-Indians unless the dispute implicates an important tribal interest. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *South Dakota v. Bourland*, 113 S. Ct. 2309, 2320 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality). A-1 and Stockert argue that because this case involves no such tribal interest, the district court erred in holding that the tribal court had subject matter jurisdiction over this dispute. The Frederickses and the tribal defendants (collectively "the appellees") argue that a different line of Supreme Court authority governs this issue. The appellees argue that language from this line of cases indicates that the district court correctly concluded that tribal courts have inherent civil jurisdictional authority over all disputes arising on the reservation, regardless of whether the parties involved are tribal members. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Williams v. Lee*, 358 U.S. 317 (1959). The appellees contend that the district court correctly found

that the tribe had full geographical/territorial jurisdiction over this dispute. The issue presented for our review is largely unresolved and has generated a great deal of interest and commentary. See, e.g., Allison S. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1 (1993) (detailing and criticizing the Supreme Court's increasing emphasis on membership-based sovereignty).

In our view, the standards articulated in *Montana v. United States*, 450 U.S. 544 (1981), and subsequent cases applying those standards, control the resolution of this dispute. In *Montana*, the Supreme Court specifically addressed the reach of tribal civil jurisdiction over non-Indian parties and found that:

the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted). The Court then announced the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.⁴

⁴ Stated another way: "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's

Indian tribes, however, do "retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* (emphasis added). This jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when a nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). These two situations are the "two exceptions" to *Montana's* general rule that an Indian tribe does not have inherent sovereign powers over the activities of nonmembers. *Bourland*, 113 S. Ct. at 2320. In our view, the tribal court in this case would not have subject matter jurisdiction under *Montana* unless the appellees can establish the existence of a tribal interest under either of the two exceptions.

The Supreme Court has reiterated or reaffirmed the *Montana* analysis of civil tribal jurisdiction over non-Indians a number of times. *Bourland*, 113 S. Ct. at 2319 (reasserting the centrality of the observation in *Montana* that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *County of Yakima v. Confederated Tribes*

dependent status, that is, to the extent it involves the tribe's 'external relations.' " *Brendale*, 492 U.S. at 425-26 (plurality) (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). The tribe's external relations are generally those involving nonmembers of the tribe. See *id.*

and Bands of Yakima Indian Nation, 502 U.S. 251, 267 (1992) (citing *Montana* in referring to the "long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations"); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (criminal jurisdiction case reciting *Montana's* observation that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*), overruled by statute on other grounds, 25 U.S.C. § 1301(2) & (3); *Brendale*, 492 U.S. at 426-27 (plurality) (following *Montana* principles and concluding there was no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation). Perhaps the Court's most emphatic reiteration of these standards is its recent statement that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' " *Bourland*, 113 S. Ct. at 2320 n.15.

The appellees argue that instead of applying the *Montana* analysis, we should resolve this case under the Supreme Court's decisions in *Iowa Mutual*, *National Farmers Union*, *Williams v. Lee*, and *Merrion*. In our view, none of those cases supports the appellees' contentions that the tribal court has the broad civil subject matter jurisdiction the tribal courts and the district court found in this case. In *Iowa Mutual*, the Court held only that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. 480 U.S. at 18-19; see also *Brendale*, 492 U.S. at 427

n.10 (the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved). In reaching its conclusion on the exhaustion requirement, the Court offered the following observation upon which the appellees rely heavily:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18. The appellees argue that this language indicates that Indian tribes retain unrestricted territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by treaty or federal statute. The appellees contend that like a state, the tribe retains full sovereignty over all matters arising on the reservation unless and until that jurisdiction is divested by federal law. The appellees further argue that consistent with *Iowa Mutual*, the tribal court may exercise subject matter jurisdiction in this case because it happened on the reservation and there has been no affirmative divestment of the tribe's authority.

In our view, the appellees' reading of this isolated language from *Iowa Mutual* is unnecessarily broad and conflicts with the principles of *Montana*. This language from *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*, which the Court cites in making those observations.

When the Court observes in *Iowa Mutual* that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty,” 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say “[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,” *id.* (emphasis added), the Court again is referring to a tribe’s civil jurisdiction over tribal-based activities that exists under *Montana*. We recently interpreted the *Iowa Mutual* case in just such a fashion, stating: “Civil jurisdiction over tribal-related activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute.” *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

National Farmers Union, like *Iowa Mutual*, was an exhaustion case which did not decide whether tribes had jurisdiction over nonmembers. *Brendale*, 492 U.S. at 427 n.10. Nonetheless, the appellees contend that we should read *National Farmers Union* as a limitation on the reach of *Montana* because *National Farmers Union* limited the reach of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a criminal tribal jurisdiction case upon which *Montana*

relied. In *Oliphant*, the Court had concluded that tribal courts have no criminal jurisdiction over non-Indians because the tribe did not retain the inherent authority to exercise that type of jurisdiction. 435 U.S. at 208-10. The Court in *National Farmers Union* stated that “the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.” 471 U.S. at 855. The appellees argue that in *National Farmers Union* the Court refused to extend *Oliphant*’s limitation of inherent sovereign authority to civil cases.

The appellees fail to recognize the fact that *Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. *Montana*, 450 U.S. at 565 (“Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”) (footnote omitted). *Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question – which would have completely prohibited civil jurisdiction over nonmembers. Instead, the Court found that the tribe retained some civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* exceptions. 450 U.S. at 565-66. Thus, when *National Farmers Union* states that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant*, that observation is perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*. Under *Montana*, the tribe has the ability to exercise civil jurisdiction over non-

Indians when tribal interests (as defined in the *Montana* exceptions) are involved.

We also read the other cases the appellees rely upon within the limits of *Montana*. In *Williams*, the Court found that the tribal courts had jurisdiction over a suit by a non-Indian store owner on the reservation against two members of the tribe for breach of contract based on a transaction that occurred on the reservation. 358 U.S. at 218, 223. This factual situation fits squarely under the "consensual agreement" test for jurisdiction in *Montana* (the first *Montana* exception). In fact, *Montana* specifically cited *Williams* in creating the two exceptions that allow for civil jurisdiction over non-Indians. 450 U.S. at 544-45.

Similarly, the appellees read too much into language from *Merrion*, where the Court stated in a footnote: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." 455 U.S. at 149 n.14. The Court made the observation in isolation in a case dealing with the tribe's authority to impose a severance tax on non-Indians on the reservation. The Court found this taxation power was derived either from the tribe's inherent power of self-government or the power to exclude, *id.* at 149, both of which are consistent with the inherent powers the tribe retains over nonmembers described in *Montana*. Both *Merrion* and *Iowa Mutual* say essentially the same thing: the inherent attributes of sovereignty that an Indian tribe retains, which under *Montana* are very limited when dealing with non-Indians, remain intact unless affirmatively limited by the federal government.

The appellees argue that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on non-Indian fee lands - i.e., plots of land owned by non-Indians in fee simple that happen to be located within the exterior boundaries of the reservation. In our view, the appellees place an artificial limitation on those cases. While *Montana* and *Brendale* address questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands. To the contrary, the *Montana* Court found, without any qualification whatsoever, that tribal power may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564. *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and provided the two limited situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). Thus, *Montana* explicitly addressed the authority of tribes to exercise civil jurisdiction on the reservation, as well as on non-Indian fee lands. The *Brendale* plurality noted that *Montana* involved regulation of fee lands, but it did not specifically limit the *Montana* rationale to fee land disputes. See *Brendale*, 492 U.S. at 426-27. Since *Brendale*, the Supreme Court likewise has not seen fit to limit either *Montana* or *Brendale* in the fashion the appellees have suggested. Instead, the Court has discussed these cases and their observations about tribal jurisdiction in broad and unqualified language. See *Bourland*, 113 S. Ct. at 2319; *County of Yakima*, 502 U.S. at 267; *Duro*, 495 U.S. at 687.

Moreover, a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*. See *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC*, 905 F.2d at 1314 (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); see also *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the interests of Indians on Indian lands). Thus, we conclude that any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of those two cases.

The appellees next argue that we should read the *Montana* line of cases as addressing tribal regulatory power over non-Indians and the line of cases represented by *Iowa Mutual* as addressing tribal adjudicatory power over non-Indians. They contend that *Iowa Mutual* and related cases would control in this case, which is a dispute about tribal adjudicatory power. The appellees assert that drawing such a distinction would be the best way to resolve what they see as the apparent contradiction between the language from those differing lines of cases.

Again, we must disagree. While the distinction the appellees propose appears in some commentaries, see, e.g., Dussias, 55 U. Pitt. L. Rev. at 43-78, the distinction does not appear explicitly, or even implicitly, anywhere in the case law. *Montana* and the cases following *Montana*

have dealt with questions of civil tribal regulatory jurisdiction, but those cases have never suggested that their reasoning is limited solely to regulatory matters. Quite the contrary, as we have noted above, those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction. Likewise, *Iowa Mutual* and the other cases the appellees rely on have never suggested such a distinction. In fact, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to regulatory jurisdiction. *Iowa Mutual*, 480 U.S. at 18.

Moreover, any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction in this case would be illusory. If the tribal court tried this suit, it essentially would be acting in both an adjudicatory capacity and a regulatory capacity. At oral argument, all of the parties agreed that if the tribal court tried this case, it would have the power to decide what substantive law applies. Essentially, the tribal court would define the legal relationship and the respective duties of the parties on reservation roads and highways. Thus, while *adjudicating* the dispute, the tribal court also would be *regulating* the legal conduct of drivers on the roads and highways that traverse the reservation. Accordingly, we see no basis in this case for applying the regulatory-adjudicatory distinction the appellees have proposed.

Furthermore, even if we applied a regulatory-adjudicatory distinction, it would not change our conclusion. None of the cases, including those that the appellees argue are "adjudicatory jurisdiction" cases, have ever

addressed the issue presented here – a tribal court's civil jurisdiction over an accident involving non-Indian parties. As we have demonstrated above, all of the appellees' proposed "adjudicatory" cases are consistent with the *Montana* case. Even if we were to treat *Montana* as a "regulatory" authority case, we see no reason not to apply its principles to this open question of inherent authority to exercise civil adjudicatory jurisdiction over this dispute. Thus, we see no valid basis for distinguishing or limiting *Montana*, as the appellees suggest.

Arguably, some of the language from *Iowa Mutual, Williams*, and *Merrion* can be viewed in isolation to create tension with *Montana*. A careful reading of the particular language of those cases, however, indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and by the leading treatise on American Indian law, which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law*, 342-43 (1982 ed.). This well-accepted rule controls this case.

Finally, the appellees urge us to follow a recent decision in a case factually very similar to this case, where the

Ninth Circuit held that the tribal court had jurisdiction over the lawsuit. *See Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994). In *Hinshaw*, Christian Mahler died from injuries he received when a car driven by Lynette Hinshaw collided with the motorcycle Mahler was riding on a U.S. highway within the boundaries of the Flathead Indian Reservation. Both Mahler and Hinshaw were residents of the reservation, but they were not members of the tribe. *Id.* at 1180. Mahler's mother (an enrolled member of the tribe) and Mahler's father (a nonmember) brought wrongful death and survivorship actions in the tribal court. Hinshaw challenged the tribal court's personal and subject matter jurisdiction in federal district court. The Ninth Circuit affirmed the district court's conclusion that the tribal court had jurisdiction over those claims. *Id.* at 1180-81. To the extent that Hinshaw supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it. Such a broad interpretation of civil tribal jurisdiction is, we believe, inconsistent with *Montana*.

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The authority is quite clear that the kind of sovereignty the American Indian tribes retain is a *limited* sovereignty, and thus the exercise of authority over nonmembers of the tribe "is necessarily inconsistent with a tribe's dependent status." *Brendale*, 492 U.S. at 427 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). Stated another way, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565, quoted in *Duro v. Reina*, 495 U.S. at 687. As such, we cannot endorse the appellees' concept

of plenary tribal territorial (or geographical) civil jurisdiction. Such a concept presents an overly broad interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and is contrary to *Montana*. Thus, for the tribe to exercise civil jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

While the tribe's inherent authority to assert civil jurisdiction over a nonmember depends on the existence of a tribal interest as defined in *Montana*, that does not mean geography plays no role in the sovereignty and jurisdictional inquiry. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). In *Montana*, the Court accounted for this geographical component of the jurisdictional analysis when it stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565 (emphasis added). *Montana* implicitly recognizes that without the geographic connection to Indian country, the tribes would have no plausible grounds for asserting jurisdiction over the non-Indian parties. Thus, properly understood, the geographical component of the jurisdictional analysis is important but not dispositive. See generally *Bracker*, 448 U.S. at 151 (geographical component of tribal sovereignty is important – though not dispositive factor for courts to weigh in determining whether a state's authority to tax non-Indians for activities on reservation has been preempted).

III.

Applying *Montana* to this case, there must be a tribal interest at issue (as defined in the *Montana* exceptions) before the tribal court can exercise jurisdiction over the non-Indian parties. We conclude that no such tribal interest exists in this case. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. Those facts, which stand alone in this case, make this dispute distinctively non-tribal in nature.

The appellees argue that the "consensual relationship" test (the first *Montana* exception) is satisfied because A-1 voluntarily entered into a subcontract with the tribe and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that subcontract when he was involved in the accident with Gisela Fredericks. In our view, that reasoning is flawed. The dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit of the "consensual agreement," i.e., the subcontract between the tribes and A-1. Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident.⁵

⁵ A-1 and Stockert have noted that under the terms of the subcontract involved in this case, all disputes arising out of the subcontract would be determined under Utah law and would be heard in the Utah courts. The appellees have not argued to the contrary. However, we will not give this fact any controlling weight because the subcontract is not part of this record.

The appellees also argue that the second Montana exception is satisfied because the dispute arose on the reservation, and therefore, the conduct in dispute here necessarily affects the tribe's political integrity, economic security, or health or welfare. The appellees contend that the dispute affects the tribe's political integrity because it deals with the tribe's ability to function as a fully sovereign government. We disagree. In our view, this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and customs. It deals only with the conduct of non-Indians and the tribe's asserted ability to exercise plenary judicial authority over a decidedly non-tribal matter. The only governmental interest the tribe alleges is the right to act as a full sovereign to exercise full sovereign authority over events that happen within its geographical boundaries. As noted above, tribes are limited sovereigns and do not possess full sovereign powers. Thus, this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception.

The appellees also argue that even though Mrs. Fredericks is a non-Indian and nonmember of the tribe, she is a long-time resident of the reservation and hence is an imbedded member of the community with a recognizable social and economic value to the tribal community. Thus, they argue that it is critical to provide her a tribal forum for her disputes. The simple fact that Mrs. Fredericks is a resident of the reservation, however, does not satisfy the second *Montana* exception. It is not essential to the tribe's political integrity, economic security, or health or welfare to provide her, a non-Indian and nonmember, with a

judicial forum for resolution of her disputes. A forum is available to Mrs. Fredericks in the North Dakota state courts, and there is no indication that she would be prevented from asserting her claims, in full, in that forum.⁶

Likewise, the fact that Mrs. Fredericks wants to bring her suit in the tribal courts does not control. *Montana* very clearly states that the conduct giving rise to the case must threaten or have a "direct effect on the political integrity, economic security, or health or welfare of the tribe," not the nonmember, before the tribe can assert civil jurisdiction over nonmembers. 450 U.S. at 466 (emphasis added). Nor is it persuasive to us that Mrs. Fredericks may be as close to being a member of the tribe as she could be without actually being a member. *Montana* is very clear that tribal membership is of critical importance. Mrs. Fredericks is neither an Indian nor a member of the tribe. The fact that Mrs. Fredericks has not been admitted to membership in the tribe places her outside

⁶ There has been some discussion of the effect of 28 U.S.C. § 1360 on jurisdiction of the North Dakota state courts. That section, by its very terms, applies only to the state court's jurisdiction over actions to which Indians are parties. See also 25 U.S.C. § 1322 (similar jurisdictional provision of Indian Civil Rights Act). Because we have found that this case does not involve any Indian parties, those sections simply do not apply to this case. We note that even if applicable, those sections would tend to indicate that the North Dakota state courts have jurisdiction over this case. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986) (North Dakota's attempt to disclaim unconditional state court jurisdiction over civil claims arising in Indian country held invalid).

the reach of the tribe's inherent authority, absent some separate showing of a direct effect on the tribe. In this case, the appellees have completely failed to show that the tribe's ability to govern or protect its own members would be directly damaged if the tribe cannot assert jurisdiction over this lawsuit. Thus, the second exception to *Montana* does not apply.

IV.

Simply stated, this case is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe retains the ability to govern itself because the tribal court will have jurisdiction whenever a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. Because we have concluded that no tribal interest as defined in *Montana* exists in this case, we conclude that the tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction over this dispute through its tribal court. Accordingly, we reverse the judgment of the district court.

BEAM, Circuit Judge, with whom FLOYD R. GIBSON, McMILLIAN, and MURPHY, Circuit Judges, join, concurring and dissenting.

I concur in the court's "comprehensive and integrated" rule that "a valid tribal interest must be at issue

before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law." *Supra* at 15-16. I dissent, however, from the court's application of the rule in this case and from the implication that a tribal court has no jurisdiction in a civil case unless the dispute involves an Indian or a member of the tribe.

The concept of "tribal interest" as advanced by the court appears to be a free-floating theory wholly detached from geographic reality except in a most attenuated way. I dissent from this ideation of tribal jurisdiction because it is contrary to *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and other earlier cases, to say nothing of *Montana v. United States*, 450 U.S. 544 (1981), the case most heavily relied upon by the court.

A legitimate judicial system arises as an attribute of sovereignty. Indeed, "the existence and extent of a tribal court's jurisdiction . . . require[s] a careful examination of tribal sovereignty." *National Farmers Union*, 471 U.S. at 855. Accordingly, any determination of tribal court jurisdiction requires examination of the parts and pieces of tribal sovereignty and how they fit within the jurisdictional equation.

Historically, the connection of Indians to the land has shaped the course of Indian law. In the landmark case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), Indian

nations were recognized as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." In *Williams v. Lee*, 358 U.S. 217 (1959), the Court recognized the importance of Indian land when it decided the question of jurisdiction over a case brought in state court by a non-Indian merchant against Indian customers. Holding that the case should have been brought in tribal court, the Court stated "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

Even in more recent cases the Court has recognized the significance of geography to tribal sovereignty. In *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975), the Court noted that its cases had consistently recognized that the Indian tribes retain "attributes of sovereignty over both their members and *their territory*." (Emphasis added.) *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), explores a tribe's historic power to exclude others from tribal lands.

Brendale supports a rule which would allow a court to consider Indian territory in determining the tribe's interest in a given case. The plurality in *Brendale* suggests a case-by-case approach to deciding whether *Montana's* second exception confers tribal jurisdiction. The precise wording of the second exception, the plurality writes, indicates that "a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribes', but instead depends on the circumstances." *Brendale*, 492 U.S. at 429. Thus, *Brendale* suggests

that the meaning of *Montana's* second exception is not static but depends on various factors.

All of these cases further suggest that geography plays a vital role in a tribe's political integrity, economic security, health and welfare, and therefore must be strongly considered in any application of *Montana's* second exception, whether or not Indian or tribal members are parties to the dispute.

Even *Montana* lends support to the geographic component of tribal court jurisdiction. The Supreme Court stated:

[t]o be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands.

450 U.S. at 565 (emphasis added). The Court in *Montana* cited its earlier holding in *United States v. Wheeler*, 435 U.S. 313 (1978) and noted that Indian Tribes are " 'unique aggregations possessing attributes of sovereignty over both their members and *their territory*.' " 450 U.S. at 563 (emphasis added).

In finding no jurisdiction here, the court describes tribal membership as "critical" to the Court's holding in *Montana*. *Supra* at 20. Such a characterization oversimplifies *Montana*, overstates the role tribal membership plays in a determination of tribal court jurisdiction and understates the role of territorial integrity. *Montana* was the product of several factors, including the nature of the regulation in question and the application of that regulation to fee land. It fully recognized that non-Indians and nonmembers of a tribe can affect the political integrity,

economic security, health and welfare of a tribe under the proper circumstances. The *Montana* Court's establishment of two tribal jurisdiction "exceptions" and its refusal to wholly extend its holding in *Oliphant*¹ to civil jurisdiction demonstrates the Court's cognizance of the influence of non-Indians and tribal real estate on tribal self-government.

One of the strongest interests that the tribe advances in this case is its interest in providing a forum for this plaintiff. And, the question of North Dakota state court jurisdiction is not as clear-cut as the court suggests. In fact, such jurisdiction is doubtful.

Two important points are relevant to this issue. First, Public Law 280, 28 U.S.C. § 1360, does not, for reasons other than those advanced by the court, have any bearing on this issue. In footnote 6, *supra* at 19, the court explains that 28 U.S.C. § 1360 applies only to actions to which Indians are parties. The original Public Law 280, however, applied to *all* "civil causes of action." See Act of Aug. 15, 1953, Pub. L. 280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360); see also Felix S. Cohen, *Handbook of Federal Indian Law* 362-63 (1982 ed.). Under the original Act, assumption of jurisdiction was mandatory for some states and optional for others, including North Dakota. It was not until 1968, when amendments to Public Law 280 were enacted, that state assumption of jurisdiction was limited to actions to which Indians were parties, subject to tribal

¹ In *Oliphant*, the Court held that tribal courts could not validly assert criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

consent. North Dakota had chosen to assume civil jurisdiction before the amendments were adopted,² but had voluntarily conditioned its jurisdiction upon consent of the tribes. N.D. Cent. Code § 27-19-01 (1991). The tribes of the Fort Berthold reservation did not consent. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g I*, 467 U.S. 138 (1984). Thus, North Dakota has no jurisdiction over the Fort Berthold reservation under 28 U.S.C. § 1360.

My second point is more relevant to the question of the authority of a state court to assume jurisdiction over a cause of action arising on an Indian reservation. Even absent jurisdiction conferred by federal statute, state courts may exercise jurisdiction over some civil causes of action arising on reservation lands. The scope of state court jurisdiction is limited by the *Williams v. Lee* "infringement" test: "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. State court jurisdiction cannot be disclaimed, at least where there is no other forum in which to bring an action. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g II*, 476 U.S. 877 (1986).

Thus, the question of whether a North Dakota state court can provide a forum for Mrs. Fredericks depends upon whether state jurisdiction in this instance would

² As Felix Cohen explains, although the amendments altered any prospective assumption of Public Law 280 jurisdiction, it preserved all jurisdiction previously acquired under the Act. Cohen, 363 n.126.

infringe upon the tribe's right to self government. Commentators seem to agree that state courts have subject matter jurisdiction over suits by non-Indians against non-Indians, even when the claim arises in Indian Country, so long as Indian interests are not affected. *See, e.g.,* Cohen, 352 ("The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases."); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country* 1990, 16 Am. Indian L. Rev. 319, 346 (1991).

The Three Affiliated Tribes have, however, adopted a tribal code which outlines civil court jurisdiction within the exterior boundaries of the reservation and which, in the absence of federal law to the contrary, imposes tribal law and custom, not North Dakota statute or common law, as controlling precedent for torts occurring within the reservation. *See* Tribal Code of the Three Affiliated Tribes of the Fort Berthold Reservation Ch. 1, § 2 (1980); *see also* Cohen 334-35.

Thus, in this case, state court jurisdiction would infringe upon the tribe's right of self government including the right to provide a forum, indeed the only forum, available to this resident of the reservation. The accident occurred on Indian land over which the tribe asserts territorial sovereignty and involved a non-Indian truck driver brought onto the reservation by a commercial contract between the tribe and his employer. Even though Mrs. Fredericks was a non-Indian, she had long resided on the reservation with a tribal member spouse (now

deceased) and is the mother of adult children who are enrolled members of the tribe. Had either accident participant been an Indian, the situs of the accident on the reservation would have clearly dictated tribal court jurisdiction as established in *Brendale*, *Iowa Mutual*, *National Farmers Union* and *Montana*. The tribal court has jurisdiction over Mrs. Fredericks' claim. I dissent from the court's ruling to the contrary.

FLOYD R. GIBSON, Circuit Judge, with whom McMILLIAN, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I agree with Judge McMillian's and Judge Beam's dissents. I write separately to express my dismay at this Court's unduly narrow view of "limited sovereignty." The type of "limited sovereignty" allotted by this Court to the tribe is, in fact, no real sovereignty at all.

Whether framed in terms of inherent tribal sovereignty under *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), or tribal interests under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), the power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power. As Chief Justice Marshall observed:

No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821). This case does not present an extraordinary occurrence. As the majority opinion notes, this case involves "an ordinary run-of-the-mill automobile accident." *Ante* at 18. The majority opinion today denies the tribe the ability to adjudicate the type of basic disputes that occur daily within Indian territory unless these disputes involve tribal members. Such a restriction interferes with the tribe's ability to manage its affairs by compromising its ability to deal with non-tribe members who happen to wreak havoc on tribal land.

I believe that the analysis and underlying rationale set forth in *Montana* have no relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians. 450 U.S. at 557-67. As such, I would limit the rule of that case to its facts and rely instead on the broad scope of inherent tribal sovereignty outlined in cases such as *Iowa Mutual*, 480 U.S. at 18.¹

Even if I were convinced that the reach of *Montana* is as broad as the majority of this Court believes it to be, I believe that this case implicates tribal interests and, as

¹ Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact.

Citations and quotation omitted.

such, falls squarely under either of the two *Montana* exceptions. I believe that this case meets the "consensual relationship" test under the first *Montana* exception because it arose as a direct result of A-1's consensual commercial contacts with the tribe. See 450 U.S. at 565-66. Had A-1 not subcontracted with LCM Corporation, a corporation wholly owned by the tribe, to perform construction work on a tribal community building within the boundaries of the reservation, the accident would never have occurred. The majority claims that there is "no proof (as opposed to allegations) . . . to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident." *Ante* at 3, note 1. I, however, fail to see any other plausible explanation as to why a gravel truck owned by A-1, a non-Indian-owned company, was on tribal land at the time of the collision. Because I believe that the accident clearly arose as the result of A-1's consensual relationship with the tribe and its members, I believe that the tribe retains the inherent sovereign power to exercise civil jurisdiction over A-1 under the first *Montana* exception.

I also believe that the tribe retains the inherent power to exercise civil authority over A-1 under the second *Montana* exception because A-1's conduct on tribal land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The majority dismisses the tribal interests at stake here as a "desire to assert and protect excessively claimed sovereignty." *Ante* at 19. As previously observed, however, the ability of a sovereign, even a limited sovereign, to adjudicate the everyday affairs and accidents occurring within its borders and provide a

forum for its citizens is one of the most basic and indispensable aspects of sovereignty. Aside from the threat to the tribe's political integrity, the majority opinion also unfairly discounts the effect of A-1's conduct on the health and welfare of the tribe. *Ante* at 18-20. While the immediate victim of the collision, Gisela Fredericks, is not a member of the tribe, she is nonetheless a longtime resident of the reservation whose husband and adult children are enrolled tribal members. To claim that A-1's conduct on tribal land had no effect on the health or welfare of the tribe is simply unrealistic and not in accordance with the facts.

For the aforementioned reasons, I would affirm the order of the district court.

McMILLIAN, Circuit Judge, with whom FLOYD R. GIBSON, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I join in Judge Beam's opinion concurring in part and dissenting in part, particularly the emphasis on the importance of geography or territory in analyzing issues of tribal sovereignty. I write separately to set forth the reasons why I would hold that the federal district court, and the tribal courts, correctly decided that the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

There are no disputed issues of fact relevant to the jurisdiction issue. None of the parties are tribal members. Gisela Fredericks is a resident of the reservation; the truck driver, Lyle Stockert, and his employer, A-1 Contractors, are not residents, but A-1 was performing work on the reservation under a subcontract agreement with

LCM Corp., a corporation wholly owned by the tribe, in connection with the construction of a tribal community building. Because the accident occurred within the exterior boundaries of the reservation, on a state highway right-of-way,¹ the cause of action arose on the reservation. The tribal code establishes personal and subject matter jurisdiction and applies tribal law and custom.

The legal issue presented, tribal court civil jurisdiction, is a question of federal law subject to *de novo* review. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). The jurisdiction issue is properly presented for determination on the merits. Tribal remedies have been exhausted, and we have the benefit of the tribal trial and appellate courts' opinions as well as that of the federal district court.

I would hold the tribal court has civil jurisdiction because of the presumption in favor of inherent tribal sovereignty, *Montana* applies only to issues involving fee lands, *Iowa Mutual* establishes more than a rule of exhaustion of tribal remedies, the Handbook of Federal Indian Law does not definitively resolve the issue, and

¹ Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the [Supreme] Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

state court jurisdiction does not preclude tribal court jurisdiction. Finally, I would hold that even if *Montana* applies, providing a forum for reservation-based tort actions, even where the parties are non-Indian, falls within both *Montana* exceptions.

INHERENT TRIBAL SOVEREIGNTY

The majority opinion would not extend inherent tribal sovereignty over the activities of non-members, absent consent or some direct effect on the tribe. I remain convinced that the opposite presumption applies, that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (*Iowa Mutual*). See *Hinshaw v. Mahler*, 42 F.3d 1178, 1180-81 (9th Cir.) (tribal court jurisdiction over action brought by tribal member on behalf of non-tribal member child against non-tribal member arising out of car accident on reservation), *cert. denied*, 115 S. Ct. 485 (1994).

Indian tribes possess " 'inherent powers of a limited sovereignty which has never been extinguished.' " *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted), citing Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.). The Supreme Court has repeatedly emphasized that "there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (pre-emption of state authority over non-Indians acting on tribal reservations). See generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The*

Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1 (1993). Thus, "Indian tribes retain 'attributes of sovereignty over both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual*, 480 U.S. at 14, citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323 (emphasis added). Implicit divestiture of inherent sovereignty has been found necessary only

where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980) (footnote omitted).

The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them."

Iowa Mutual, 480 U.S. at 14, citing *Williams v. Lee*, 358 U.S. 217, 220 (1959). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

There is no ground for divestiture of inherent tribal sovereignty in the present case. No specific treaty provision or federal statute has been shown to affirmatively limit the power of the tribal courts of the Three Affiliated Tribes over civil actions that arise on the reservation, and the exercise of tribal civil jurisdiction over a tort action arising on the reservation between non-members does not implicate foreign relations, alienation of land, or the criminal prosecution of non-Indians.

STATUS OF LANDS AT ISSUE

First, *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*), and *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993) (*Bourland*), are not controlling. *Montana* and *Brendale* involved attempts by the tribes to regulate the activities of non-members on fee land, that is, land owned by non-members within the reservation; *Bourland* involved lands taken by the federal government for the construction of a dam and reservoir. The distinction between land conveyed in fee to non-Indians pursuant to the Indian General Allotment Act of 1887, 24 Stat. 388, which was intended to eliminate the reservations and assimilate the Indian peoples, or, in

Bourland, land taken by the federal government, and land owned by the tribe or trust land held by the federal government in trust for the tribe or individual members of the tribe, is fundamental to the analysis in *Montana*, *Brendale* and *Bourland*. The present case does not involve fee land or land taken by the federal government for public use. For that reason, I would apply *Montana*, and its exceptions, only to fee lands owned by non-tribal members.

A close reading of Justice Stewart's opinion for the Court in *Montana* demonstrates the importance of geographical or territorial status of the land at issue to tribal sovereignty analysis. The Court's analysis differentiated between fee lands and lands owned by the tribe or held in trust for the tribe. The competing regulatory authorities were the tribe and the state, each of which asserted the authority to regulate hunting and fishing by non-members within the reservation. The Court framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547 (emphasis added), 557. The Supreme Court held that the tribe could prohibit non-members from hunting or fishing on land owned by the tribe or trust land, *id.* at 557, and, if the tribe permitted non-members to fish or hunt on such lands, could condition their entry by charging a fee or establishing bag and creel limits. *Id.* However, the Court held inherent tribal sovereignty over the reservation did not extend to tribal regulation of non-Indian fishing and hunting on reservation land owned in fee by non-members. *Id.* at 564-65. The

Court admitted that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565 (emphasis added). The first *Montana* exception recognizes tribal regulatory authority over non-members who enter consensual relationships with the tribe or its members. *Id.* The second *Montana* exception expressly recognizes a tribe's "inherent power to exercise over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* (emphasis added). If inherent tribal sovereignty can include civil jurisdiction over non-Indians on fee lands within the reservation, it should include civil jurisdiction over non-Indians on tribal land or trust land within the reservation. This is because tribal civil jurisdiction is more restricted on fee land than on tribal or trust land.

Brendale also involved fee lands within the reservation; the competing regulatory authorities were once again the tribe and the state (or, more precisely, one county). The issue presented was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The tribal zoning ordinance applied to all lands located within the reservation, part of which was located in Yakima County. The county zoning ordinance applied to all lands located within the county, except for tribal trust lands. Most of the reservation was tribal trust land, referred to as the "closed area"; the rest

was fee land located through out the reservation in a checkerboard pattern but mostly in one part of the reservation, referred to as the "open area." The county had approved two proposed developments, one in the open area and one in the closed area, on fee lands owned by non-members of the tribe, that conflicted with the tribal zoning ordinance. The tribe sued to stop the proposed development and challenged the county's zoning authority over the reservation.

The judgment of the Court was divided. The Court, in an opinion by Justice White, upheld application of the county zoning ordinance to the fee land located within the open area, under both the treaty language, *id.* at 422-25, and the *Montana* inherent tribal sovereignty analysis. *Id.* at 425-32. However, the Court, in an opinion by Justice Stevens, upheld application of the tribal zoning ordinance to the fee land located within the closed area. *Id.* at 433-47 (differentiating between "essential character" of closed and open areas and noting open area was at least half-owned by non-members, had lost its character as an exclusive tribal resource, and, as practical matter, had become integrated part of county that is not economically or culturally delimited by reservation boundaries). Although the opinions reach different decisions for different reasons, it is important to note that the regulatory dispute involved the authority to control development of fee lands and not land owned by the tribe or held in trust for the tribe. *Cf. United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the

land"). Justice Blackmun would have upheld the tribe's exclusive authority to zone reservation land, including fee lands, and thus concurred in part and dissented in part. *Id.* at 448-68.

In *Bourland* the competing regulatory authorities were once again the tribe and the state. At issue were not fee lands, however, but former trust and fee lands that had been taken by the United States for construction of a dam and reservoir for flood control. The taking authorization also "opened" the taken land for recreational use, including hunting and fishing, by the public at large. As in *Montana*, the tribe sought to regulate hunting and fishing by non-members on the reservation, including the land taken for the flood control project. The state filed suit to enjoin the tribe from excluding non-Indians from hunting and fishing on the taken lands within the reservation. The Court, in an opinion by Justice Thomas, held that Congress, in enacting the flood control legislation, had abrogated the tribe's right under the relevant treaty to exclude non-Indians from the taken lands. 113 S. Ct. at 2316. The Court also held that inherent tribal sovereignty did not enable the tribe to regulate non-Indian hunting and fishing in the taken area in the absence of any evidence in the relevant treaties or statutes that Congress intended to allow the tribe to assert such regulatory jurisdiction. *Id.* at 2319-20. The Court, however, remanded the case for further consideration of whether the tribe retained the inherent sovereignty to regulate non-Indian hunting and fishing in the taken area under the two *Montana* exceptions. *Id.* at 2320. Justice Blackmun dissented and would have held that the tribe had the authority to regulate non-Indian hunting and fishing in

the taken area because the relevant statutes did not affirmatively abrogate either the tribe's treaty rights or inherent tribal sovereignty. *Id.* at 2323-24.

EXHAUSTION OF TRIBAL REMEDIES

Next, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers Union*), and *Iowa Mutual* do not establish only a rule of exhaustion requiring tribal courts to determine their jurisdiction in the first instance. The rule of exhaustion established in *National Farmers Union* is premised upon the Court's decision that tribal civil jurisdiction over non-Indians is not automatically foreclosed by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding federal legislation conferring jurisdiction on federal courts to try non-Indians for offenses committed in Indian country had implicitly pre-empted tribal criminal jurisdiction over non-Indians). *National Farmers Union* recognized that an exhaustion requirement would have been superfluous if there were no possibility of tribal civil jurisdiction over non-Indians. 471 U.S. at 854 (because if *Oliphant* applied, federal courts would always be the only forums for civil actions against non-Indians). *National Farmers Union* thus did not foreclose tribal court jurisdiction over a civil dispute involving a non-Indian defendant. *Id.* at 855 (school district defendant). *Iowa Mutual* not only reaffirmed the rule of exhaustion established in *National Farmers Union* but also expressly stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision

or federal statute." 480 U.S. at 18; see *Brendale*, 492 U.S. at 454-55 n.5 (Blackmun, J., concurring in part and dissenting in part). This is an affirmative recognition that tribal court civil jurisdiction over reservation-based tort actions against non-Indians is part of inherent tribal sovereignty. Otherwise, there would be no point in requiring exhaustion of tribal remedies to permit the tribal courts to evaluate the factual and legal bases of any challenges to their jurisdiction because the tribal courts would never have jurisdiction.

HANDBOOK OF FEDERAL INDIAN LAW

The landmark treatise does not definitively resolve this issue. As noted by the majority opinion, Felix S. Cohen's *Handbook of Federal Indian Law* 342-43 (1982 ed.) does state that "[t]ribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." However, another section of the Handbook supports tribal civil jurisdiction over non-Indians:

Indian tribes retain civil regulatory and judicial jurisdiction over non-Indians. The extent of tribal civil jurisdiction over non-Indians, however, is not fully determined.

Analysis of the actions of each of the three federal branches demonstrates that civil jurisdiction over non-Indians has not been withdrawn and that the exercise of such jurisdiction is consistent with the tribes' dependent status under federal law. . . . In the civil field [contrary to the rule in criminal matters], Congress has

never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians. Congress' failure to regulate civil jurisdiction in Indian country suggests both that there was no jurisdictional vacuum to fill and that Congress was less concerned with tribal civil, non-penal jurisdiction over non-Indians than with tribal jurisdiction over the personal liberty of non-Indians.

The executive branch of the federal government has long acted on the assumption that Indian tribes may subject non-Indians to civil jurisdiction. Although the Attorney General and the Solicitor of the Department of the Interior have opined since 1834 that Indian tribes lack criminal jurisdiction over non-Indians, several opinions have upheld tribal civil jurisdiction. The Attorney General sustained tribal civil jurisdiction in 1855. A comprehensive 1934 Opinion of the Solicitor of the Department of the Interior concluded that "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." . . .

. . . .

The breadth of [the tribes'] retained power over non-Indians in civil matters has not been finally resolved. . . .

. . . .

A tribe presumptively has an interest in activities on lands belonging to the tribe or its members, so tribal control over Indian trust land can be the basis for extensive tribal jurisdiction over non-Indians in civil matters. Regardless of land ownership, tribal jurisdiction within reservations can also be based on transactions between non-Indians and Indians or tribes or on non-Indian activities that directly affect Indians or their property.

Id. at 253-57 (footnotes omitted). Neither excerpt definitively resolves the issue of tribal court jurisdiction over a civil suit brought against a non-Indian arising from a tort occurring on the reservation.

STATE COURT JURISDICTION

The possibility of state court jurisdiction does not preclude tribal court jurisdiction. See *Hinshaw v. Mahler*, 42 F.3d at 1180 (concurrent state and tribal jurisdiction over certain civil matters occurring on Flathead Reservation, including operation of motor vehicles on public roads), citing *Larivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563, 566-71 (1979) (same), *cert. denied*, 445 U.S. 964 (1980). However, tribal court jurisdiction may preclude state court jurisdiction, particularly where the tribe has established tribal courts and adopted a tribal code which provides for personal jurisdiction over non-Indians, subject matter jurisdiction over torts arising on the reservation,

and application of tribal law. This is particularly true if one views the issue in terms of a state's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually denied, see e.g., *Williams v. Lee*, 358 U.S. 217, as opposed to a tribe's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually upheld. See, e.g., *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993) (reserving inherent tribal sovereignty issue), *cert. denied*, 114 S. Ct. 2741 (1994). For example, in the landmark case of *Williams v. Lee* the Court held that the state court did not have jurisdiction over an action brought by a non-Indian who operated a general store on a reservation to recover money for goods sold to Indians because "the exercise of state jurisdiction [under the circumstances] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223; cf. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1341 (D.S.D. 1975) (upholding tribal court jurisdiction over tribe's suit against non-Indian lessee of tribal land).

TRIBAL SELF-GOVERNMENT

Finally, even assuming for purposes of analysis that *Montana* is not limited to disputes involving fee lands, a "consensual relationship" existed between A-1 and Stockert and the tribe by virtue of the subcontract within the meaning of the first *Montana* exception. In addition, the allegedly tortious conduct of A-1 and Stockert occurred on a state highway right-of-way on the reservation. This conduct by non-Indians within the reservation threatened

the tribe's interest in the safe operation of motor vehicles on the roads and highways on the reservation. See *Hinshaw v. Mahler*, 42 F.3d at 1180; cf. *Sage v. Lodge Grass School District No. 27*, 13 Indian L. Rep. 6035, 6039 (Crow Ct. App. 1986) (remand following *National Farmers Union*; student hit by motorcycle on school parking lot; tribe has legitimate interest in protecting health and safety of school children attending school within reservation). The tribe also has an interest in affording those who have been injured on the reservation with a judicial forum. This interest is admittedly abstract compared to the safe operation of motor vehicles. However, disregarding the jurisdiction of tribal courts, which play a vital role in tribal self-government, undermines their authority over reservation affairs and to that extent imperils the political integrity of the tribe.

For these reasons, I would affirm the order of the district court holding the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359NDBI

A-1 Contractors, et al.,	*	No. 92-3359 NDBI
Appellants,	*	Appeal from the United
vs.	*	States District Court for the
Honorable William Strate,	*	District of North Dakota
etc., et al.,	*	ORDER
Appellees.	*	ENTERED
	*	JANUARY 9, 1995

Appellants' petition for rehearing has been considered by the court and is granted. The opinion and judgment of the court entered on November 29, 1994, are vacated.

The argument date will be fixed by a later order of this court.

January 9, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359

A-1 Contractors;	•	
Lyle Stocker,	•	
	•	
Appellants,	•	
v.	•	Appeal from the United
Honorable William Strate,	•	States District Court for the
Associate Tribal Judge of	•	District of North Dakota
the Tribal Court of the	•	
Three Affiliated Tribes	•	
of the Fort Berthold	•	
Indian Reservation; Three	•	
Affiliated Tribes of the	•	
Berthold Indian	•	
Reservation, The Tribal	•	
Court; Lyndon Benedict	•	
Fredericks; Kenneth Lee	•	
Fredericks; Paul Jonas	•	
Fredericks; Hans Christian	•	
Fredericks; Jeb Pius	•	
Fredericks; Gisela	•	
Fredericks,	•	
Appellees.	•	

Submitted: June 16, 1993

Filed: November 29, 1994

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON,
Senior Circuit Judge, and HANSEN, Circuit Judge.

McMILLIAN, Circuit Judge.

A-1 Contractors and Lyle Stockert appeal from a final order entered in the District Court¹ for the District of North Dakota denying their motion for summary judgment and granting summary judgment in favor of appellees, the Frederickses and the tribal defendants (described further below). *A-1 Contractors v. Strate*, Civil No. A1-92-24 (D.N.D. Sept. 17, 1992) (*Strate*). For reversal, appellants argue the district court erred in holding the tribal court had subject matter jurisdiction over this civil cause of action between non-Indians that arose on an Indian reservation. Appellants argue that although the tribe retains sovereignty to control its own internal relations, it has been divested of any authority over non-members' activities that do not substantially affect those internal relations. For the reasons discussed below, we affirm the order of the district court granting summary judgment in favor of appellees and reserving the matter for tribal court jurisdiction.

I.

On November 9, 1990, Stockert was driving a gravel truck owned by A-1 Contractors when the truck collided with a car driven by Gisela Fredericks. Mrs. Fredericks suffered serious injuries which required her to be hospitalized for 24 days. In May 1991 Mrs. Fredericks and her adult children (collectively referred to as the Frederickses) sued appellants and Continental Western

¹ The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

Insurance Co.² in the Tribal Court for the Three Affiliated Tribes³ of the Fort Berthold Indian Reservation seeking damages in excess of \$13 million for personal injury, loss of consortium and medical expenses.

At the time of the accident, appellants were working on the reservation under a subcontract agreement with LCM Corp., a corporation wholly owned by the tribe. Under the subcontract, appellants did certain excavating, berming and recompacting work in connection with the construction of a tribal community building. All of appellants' work under the subcontract was performed within the boundaries of the reservation. Appellants are not members of the tribe nor residents of the reservation. Mrs. Fredericks is a non-tribal member resident of the reservation.⁴

Appellants made a special appearance in tribal court and moved to dismiss the action for lack of personal and subject matter jurisdiction. The tribal court denied the motion and found it had personal and subject matter

² Continental Western Insurance Co., A-1 Contractors' insurer, was a party to the proceedings before the tribal court and the tribal appellate court; however, on February 3, 1992, the insurer was dismissed as a defendant in the district court without prejudice and is not a party to this appeal.

³ The Three Affiliated Tribes - Mandan, Hidatsa and Arikara - are federally recognized Indian tribes (hereinafter "the tribe") which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

⁴ Although Mrs. Fredericks is not a member of the tribe, her late husband was a tribal member and her adult children are enrolled members of the tribe.

jurisdiction. *Fredericks v. Continental Western Insurance Co.*, No. 5-91-A04-150, slip op. at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991) (*Fredericks I*). Specifically, the tribal court found it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because appellants "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also determined that it had subject matter jurisdiction over the action as an incident of inherent tribal sovereignty unlimited by treaty or federal statute. *Id.* at 1.24(d) (invoking the second *Montana* exception).

Appellants then appealed to the Northern Plains Intertribal Court of Appeals, which affirmed the decision of the tribal court. *Fredericks v. Continental Western Insurance Co.*, Northern Plains Intertribal Ct. App. (Jan. 8, 1992) (*Fredericks II*). The tribal court of appeals remanded the case to the tribal court for further proceedings. No further proceedings had occurred in tribal court when appellants filed a complaint in federal district court on February 5, 1992, against the Frederickses and the Honorable William D. Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court (hereinafter referred to as the tribal defendants). Appellants sought declaratory relief and to enjoin the Frederickses from proceeding against them in tribal court and to enjoin the tribal defendants from asserting jurisdiction over them.

The tribal defendants answered and initially raised the affirmative defense of sovereign immunity; however,

the tribal defendants later consented to suit for the limited purpose of defending the federal law claims for injunctive relief. Appellants, the Frederickses and the tribal defendants filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied appellants' motion and granted the Frederickses' and the tribal defendants' cross-motions for summary judgment. *Strate*, slip op. at 10. The district court first decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation and that this factual dispute was irrelevant to the issue of tribal court jurisdiction. *Id.* at 5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, even though none of the parties was a tribal member, finding that tribal courts have jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute and no such limitation was shown to apply here. *Id.* at 9-10. This appeal followed.

II.

We review the grant or denial of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *Ford v. Dowd*, 931 F.2d 1286, 1289 (8th Cir. 1991).

Specifically, we must determine whether the district court correctly decided that the tribal court had subject matter jurisdiction to hear the present case. Tribal court jurisdiction is a question of federal law reviewed de novo. *Stock West Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992) (banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).

Appellants argue the district court erred in holding there is tribal court jurisdiction because the limited inherent sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between non-Indians. Appellants cite in support *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), *United States v. Wheeler*, 435 U.S. 313 (1978) (*Wheeler*), and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*).

In *Montana* the issue was whether the tribe had the authority to prohibit non-Indians from hunting and fishing on fee lands owned by non-Indians within its reservation. The Supreme Court held that it did not. The Court began its analysis by noting that although "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' . . . through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563, citing *Wheeler*, 435 U.S. at 323, 326. Although in general the tribes have lost the inherent sovereign power over the activities of nonmembers, the Court noted that "Indian tribes retain inherent

sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. First, the tribe may retain the inherent sovereign power to "regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (first *Montana* exception). In addition, the tribe may retain the inherent power to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (second *Montana* exception).

Appellants argue that the two *Montana* exceptions are the only bases upon which the tribal court may assert jurisdiction over civil disputes between non-Indians and that the present case does not fit within either exception. Appellants argue that they, Mrs. Fredericks and her adult children have not entered into any agreements or dealings with the tribe in connection with the underlying tort action so as to subject themselves to tribal court jurisdiction within the meaning of the first *Montana* exception. Appellants also argue that the underlying tort does not so threaten the tribe's political or economic security so as to warrant tribal court jurisdiction within the meaning of the second *Montana* exception.

The Frederickses and the tribal defendants argue the district court correctly held that the tribal court did have jurisdiction over a civil action brought by a non-Indian against another non-Indian arising from a tort occurring on the reservation. They argue that the tribe has retained

the inherent sovereign authority to exercise civil jurisdiction over the conduct of appellants on the reservation, notwithstanding that appellants and Mrs. Fredericks are non-tribal members, because appellants' allegedly tortious conduct had a direct effect on the welfare of the tribe. They argue that because the tort action arose on the reservation, tribal court jurisdiction is presumed and exists "unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14, 18 (1987) (*Iowa Mutual*); see also *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Stock West Corp. v. Taylor*, 964 F.2d at 918-19.

The Frederickses and the tribal defendants argue that *Montana* is inapplicable to the present case. They argue that *Montana* is limited to the issue of tribal civil jurisdiction over fee lands owned by non-Indians within the reservation and the present case does not involve fee lands owned by non-Indians. However, assuming *Montana* is applicable, they argue that both the first and second *Montana* exceptions apply and support tribal court jurisdiction in the present case. The Frederickses and the tribal defendants argue there was a consensual relationship between appellants and the tribe pursuant to the subcontract between the tribal corporation, LCM Corp., and appellants, thus satisfying the first *Montana* exception. They argue appellants voluntarily entered into the subcontract with the tribe in which appellants recognized tribal authority. All of appellants' work under the subcontract was to be performed on the reservation. In addition, they argue the allegedly tortious conduct of appellants occurred on the reservation and thus directly affected the economic security and health and general

welfare of the tribe. They argue that when a tort action arises within a reservation, especially on tribal trust land, the second *Montana* exception is satisfied.

III.

We hold the district court did not err in holding the tribal court had subject matter jurisdiction. As a preliminary matter, we note that the present case involves the issue of tribal court jurisdiction on the merits. The present case does not involve exhaustion of tribal remedies or federal court abstention. See, e.g., *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) (*Duncan Energy*), petition for cert. filed, 63 U.S.L.W. 3326 (U.S. Oct. 17, 1994) (No. 94-689). Here, tribal remedies have been exhausted. We have the benefit of the tribal courts' expertise and analysis, consistent with the federal government's long-standing policy of supporting tribal self-government, including tribal courts, and tribal self-determination. See *Iowa Mutual*, 480 U.S. at 14; *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Nor does the present case involve tribal criminal jurisdiction. *Duro v. Reina*, 495 U.S. 676, 688 ((1990) (tribal court cannot exercise criminal jurisdiction over non-tribal member); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (tribal court cannot exercise criminal jurisdiction over non-Indians). As noted earlier, the question of tribal court jurisdiction is a question of federal law which we review de novo. *Duncan Energy*, 27 F.3d at 1300.

We agree with the district court and the tribal courts that *Montana* and *Brendale* are not dispositive. We hold

that *Montana*, and the *Montana* exceptions, are inapplicable to the present case. We think the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians. *Montana* involved tribal regulation of fee lands; the Court's opinion framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547 (emphasis added), 557. *Brendale* also involved tribal regulation of fee lands. The issue was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The Court noted that fee land was located through the reservation in a checkerboard pattern, *id.* at 421, and recognized that "in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses [of fee land] on the political integrity, economic security, or the health or welfare of the tribe." *Id.* at 430-31 (referring to second *Montana* exception). See *South Dakota v. Bourland*, 113 S. Ct. 2309, 2316-17 (1993) (tribe could not regulate activities of non-tribal members on non-Indian fee lands on reservation, that is, land taken for dam project and then opened for public use as recreation area); *Brendale*, 492 U.S. at 427, 430 ("The governing principle [in *Montana*] is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee

land."); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); *Duncan Energy*, 27 F.3d at 1298; cf. *Stock West Corp. v. Taylor*, 964 F.2d at 920 (tortious acts committed on reservation land, business transactions commenced on tribal lands); *Red Fox v. Hettich*, 494 N.W.2d 638, 645-47 (S.D. 1993) (holding plaintiff failed to establish tribal court had jurisdiction over tort claim which occurred on state highway within reservation).

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18, citing *Montana*, 450 U.S. at 565-66, *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 (1980) (tribes may tax transactions occurring on tribal trust lands), and *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding tribe may impose taxes on business operated by non-Indians on basis of tribe's inherent sovereign authority to control economic activity within its jurisdiction); *Williams v. Lee*, 358 U.S. at 223 (state court did not have jurisdiction over civil suit by non-Indian against Indian where cause of action arose on reservation). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that

the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149 n.14. In the present case no specific treaty provision or federal statute has been shown to have affirmatively limited the power of the tribal courts over civil actions that arise on the reservation between non-Indians. We therefore hold the tribal court does have subject matter jurisdiction.

IV.

In the alternative, assuming for purposes of analysis that *Montana* is not limited to tribal authority over non-Indian fee lands, we agree with the district court and the tribal courts that the tribe retained the inherent sovereign authority to exercise civil jurisdiction over the activities of non-Indians within the reservation under both the first and second *Montana* exceptions. With respect to the first *Montana* exception, a "consensual relationship" existed between appellants and the tribe by virtue of the subcontract between A-1 and LCM Corp., a corporation wholly-owned by the tribe. The allegedly tortious conduct also occurred in connection with the performance of that subcontract on the reservation. Appellants thus subjected themselves to the civil jurisdiction of the tribal court.

With respect to the second *Montana* exception, the present case involved an automobile accident that occurred on a state highway right-of-way on the reservation. As noted above, territorial control is an fundamental component of inherent tribal sovereignty. Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within

the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The definition has been applied in a variety of contexts. See, e.g., *City of Timber Lake v. Cheyenne Sioux River Tribe*, 10 F.3d 554, 556-57 (8th Cir. 1993) (holding tribe can regulate liquor sales on fee lands owned by non-Indians within reservation), *cert. denied*, 114 S. Ct. 2741 (1994); *Red Fox v. Hettich*, 494 N.W.2d at 643 & n.7 (state highway within reservation); *Schantz v. White Lightning*, 231 N.W.2d 812, 815 (N.D. 1975) (holding state court did not have jurisdiction of civil action brought by non-Indian against Indian for injuries resulting from auto accident which occurred on state highway within reservation); cf. *Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1191-92 (D. Ariz. 1982) (holding U.S. highway right-of-way equivalent to non-Indian fee land within meaning of Montana in light of Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328), *decision vacated and injunction dissolved*, 574 F. Supp. 710 (1983). For example, this court is familiar with the conflict between state and tribal law enforcement on state highways on reservations. See *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (holding state had no civil or criminal jurisdiction over highways running through Indian country), *cert. denied*, 500 U.S. 915 (1991).

We think the tribe, like a state, has an important and legitimate interest in protecting the health and safety of

its members and residents on the roads and highways on the reservation. In addition, we think the tribe, like a state, also has an important and legitimate interest in affording those who have been injured in accidents on those roads and highways with a judicial remedy. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum. Tribal court jurisdiction is an important aspect of tribal sovereignty, and refusing to recognize its existence would have a demonstrably serious, adverse effect on the political integrity of the tribe.

Accordingly, we affirm the order of the district court granting summary judgment to appellees and reserving the matter for tribal court resolution on the merits.

HANSEN, Circuit Judge, dissenting.

Because the court's opinion departs from the well-established test for determining a tribal court's civil jurisdiction over non-Indian parties, I respectfully dissent. The court finds tribal court jurisdiction is appropriate here under what can best be described as a theory of "tribal territorial jurisdiction," which I believe is wholly unsupported by authority. I believe this case is controlled by *Montana v. United States*, 450 U.S. 544 (1981), and its

requirement that a tribal interest be involved before a tribal court may assert jurisdiction.

In *Montana*, the Supreme Court of the United States set forth the test for determining when an Indian tribe has jurisdiction over non-Indian parties. The Court found that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Id.* at 564 (citations omitted). The Court went on to find that "Indian tribes retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* at 565 (emphasis added). As the majority points out at page 6, the *Montana* Court described the two situations where this jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). This analysis of civil tribal jurisdiction over non-Indians has been reiterated a number of times by the Supreme Court. See *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993) (quoting *Montana's* observation that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *Duro v. Reina*, 495 U.S. 676, 687 (1990) (reciting *Montana's* observation that "the inherent sovereign powers of an Indian

tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality) (following *Montana* principles and finding no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation).

The court attempts to distinguish *Montana* and *Brendale* by placing an artificial limitation on their reasoning. It contends that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on fee lands within the boundaries of the reservation. While both of these cases do address questions of tribal authority over non-Indians on fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands.

The *Montana* case found, without qualification or caveat, that *tribal power* may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564 (emphasis added). *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and provided the two situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). The *Brendale* case expressly adopted the *Montana* rationale without further qualification. See *Brendale*, 492 U.S. at 426-27. Moreover, a number of cases also have cited to *Montana* in analyzing civil jurisdictional issues in non-fee land disputes. See *Stock West Corp. v.*

Taylor, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); see also *Tamiani Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the interests of Indians on Indian lands). Our court's attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of these cases.

Instead of relying on the well-established principles of *Montana* (adopted in *Brendale*), the majority pins its finding of tribal jurisdiction in this case on the concept that Indian tribes retain unfettered territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by federal law, and the majority finds no such affirmative limitation here. The majority concludes that the tribe retains sovereignty over all matters arising on tribal land unless and until that jurisdiction is limited (i.e., divested) by federal law. This near statehood-like conclusion essentially adopts the position of counsel for the tribal defendants who stated in oral argument that the tribe wants "to have jurisdiction over things that happen on the reservation," including things that involve non-Indians, because "that's what sovereign governments do, they control things that happen within their territory." I find this concept of plenary tribal territorial jurisdiction to be wholly unsupported by authority, an overly broad

interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and contrary to the law the Supreme Court set forth in *Montana*.

The majority attempts to support this idea of sovereign "tribal territorial jurisdiction" by relying on isolated language from *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Williams v. Lee*, 358 U.S. 317 (1959), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), in reaching the conclusion that tribes have retained "tribal territorial jurisdiction." None of these cases support the majority's finding of tribal civil jurisdiction. Our court's reading of *Iowa Mutual*, on which its opinion primarily relies, is unnecessarily broad and conflicts with the principles of *Montana*. *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*. Contrary to the majority's characterizations, the Court in *Iowa Mutual* simply holds that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. In *Brendale*, the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved. *Brendale*, 492 U.S. at 427 n.10.

In reaching its conclusion on the exhaustion requirement, the *Iowa Mutual* Court went on to offer the following observation which the majority relies heavily upon in reaching its decision:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities

presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Id. at 18. The majority asserts that because there is no act of Congress which purports expressly to divest the tribe of its jurisdiction in this matter, jurisdiction remains in the tribal court.

The Supreme Court's observation in *Iowa Mutual* should be read within the parameters of *Montana*, which is cited by the Court in making the observation. When the Court observes that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," the Court is referring to the type of activities, like consensual contractual relationships, that give rise to tribal authority under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," the Court is again referring to the civil jurisdiction the tribe possesses over non-Indians by virtue of the non-Indian's activities which give rise to tribal jurisdiction under *Montana*. We recently read the *Iowa Mutual* case in just such a fashion stating: "Civil jurisdiction over tribal-related activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* finds give rise to tribal jurisdiction over non-Indians or nonmembers.

The other cases upon which the majority relies also should be read within the limits of *Montana*. In *Williams*, the plaintiff was a store owner on the reservation and sued the defendants who were members of the tribe for breach of contract based on a transaction that occurred on the reservation. This fits squarely under the "consensual agreement" test for jurisdiction in *Montana*. Hence, jurisdiction was appropriate under the *Montana* principles without resort to the concept of tribal territorial jurisdiction.

Similarly, the majority reads too much into the footnote language in *Merrion*, where the Court stated the very general notion that "the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government. . . ." 455 U.S. at 149 n.14. The Court made the observation in a footnote without any further discussion about what are the "inherent attributes of sovereignty" which the Court had previously described. It is clear that the sovereignty the American Indian tribes retain is a *limited* sovereignty consistent with their dependent status. See *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1477 (8th Cir. 1994) (quoting *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978))). As the Court specifically noted in *Montana*, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565, quoted in *Duro v. Reina*, 495 U.S. at 687. Thus, for the tribe to exercise jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

A careful reading of the *Iowa Mutual*, *Williams*, and *Merrion* cases thus indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and the leading treatise on American Indian law which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law* 342-43 (1982 ed.). This well-accepted rule should be applied here.

Applying this rule, I believe that this court should first determine if there is a tribal interest involved in this case under *Montana*. I can find no tribal interest in this case which supports the tribal court's jurisdiction. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. The defendants have alleged that the "consensual relationship" test under *Montana* is satisfied because A-1 voluntarily entered into a subcontract with the tribe, and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that contract

when he was involved in the accident with Gisela Fredericks.¹ That reasoning is flawed because the dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, or out of, or within the ambit of the "consensual agreement," i.e., the subcontract, between the tribe and A-1. Gisela Fredericks was not a party to the contract, and the tribe is a stranger to the accident.

The defendants also allege that the second exception under *Montana* is satisfied because the dispute arose within the reservation and, therefore, the conduct in issue here affects the tribe's political integrity and welfare. I disagree. This case has nothing to do with the Indian tribe's ability to govern its own affairs or protect its own people's rights under tribal laws and customs. It deals only with the conduct of non-Indians and nonmembers and the tribe's self-asserted ability to exercise plenary judicial authority over a decidedly nontribal matter. I find nothing in this case even approaching a direct effect on the tribe's political integrity or welfare. Hence, there is no tribal jurisdiction under *Montana*.

In adopting what amounts to a concept of "tribal territorial jurisdiction," the majority is exalting the situs of the event above the tribal interest requirement set forth in *Montana*. Simply stated, this case is not about the tribe's ability to govern itself; it is about the tribe's claimed ability to govern others who are non-Indians and

¹ There is no proof (as opposed to allegations) that I can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident.

nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe's ability to govern itself is inherently maintained because the tribal court will have jurisdiction any time a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. However, because I find that the majority incorrectly applies the relevant authority and because there is no tribal interest involved in this case, I respectfully dissent from the court's decision finding civil tribal jurisdiction over this dispute.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A-1 Contractors, and Lyle Stockert,)
Plaintiffs,)

v)

Honorable William D. Strate,)
Associate Tribal Judge of the Tribal)
Court of the Three Affiliated)
Tribes of the Fort Berthold Indian)
Reservation, The Tribal Court of)
the Three Affiliated tribes of the)
Fort Berthold Indian Reservation,)
Lyndon Benedict Fredericks,)
Kenneth Lee Fredericks, Paul Jonas)
Fredericks, Hans Christian)
Fredericks, Jeb Pius Fredericks,)
Kenneth Lee Fredericks on behalf)
of Gisela Fredericks, and Gisela)
Fredericks,)

Defendants.)

Civil No.
A1-92-24

MEMORANDUM AND ORDER

(Filed Sep. 16, 1992)

This is an action for declaratory and injunctive relief brought by A-1 Contractors and its employee, Lyle Stockert, defendants in a Tribal Court action, against the Tribal Court Judge, the Tribal Court and the plaintiffs in the Tribal Court action. A-1 and Stockert challenge the Tribal Court's assumption of jurisdiction over a tort action

resulting from automobile collision which occurred on the reservation.

This court has jurisdiction under 28 U.S.C. § 1331, to determine the extent of Tribal Court jurisdiction, since A-1 has exhausted Tribal Court remedies pursuant to the rule in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Additionally, the Tribal defendants have consented to jurisdiction for the limited purpose of defending the federal law claims for the injunctive relief sought in this action.

The parties have filed summary judgment motions on the issue of Tribal Court jurisdiction. Also before the court is a motion to strike certain exhibits and a motion to amend complaint.

FACTS

On November 9, 1990, Gisela Fredericks was involved in an automobile accident with a gravel truck owned by A-1 Contractors and driven by Lyle Stockert. The parties agree the accident occurred north of Twin Buttes, North Dakota, on North Dakota State Highway 8, within the exterior boundaries of the Fort Berthold Reservation. At the time of the collision, A-1 was performing under a contract it had with a tribal-owned corporation.

Fredericks suffered extensive injuries, and incurred medical bills in the amount of \$30,000. Although Fredericks is not an enrolled member of the tribe, she owns property on the reservation, her deceased husband was an enrolled member and her five children are enrolled members. The facts are in dispute as to whether or not

Fredericks resides on the reservation. Stockert is not a member of the tribe and A-1 is a North Dakota corporation.

Fredericks and her five children brought an action in the Tribal Court of the Three Affiliated Tribes against A-1 and Stockert, seeking damages for personal injuries and for loss of consortium. A-1 filed a motion to dismiss for lack of personal and subject matter jurisdiction.

The Tribal Court denied the motion to dismiss, finding that the tribal code authorized Tribal Court jurisdiction over the parties. The Tribal Judge reasoned that Gisela Fredericks, as a resident of the Fort Berthold Reservation, has the right to avail herself on the Tribal Court system to prosecute any claims which arose within the reservation boundaries. The Tribal Court also found that jurisdiction was proper over A-1 contractors, because it entered upon and transacted business within the territorial boundaries of the reservation.

The Tribal Court concluded that A-1 Contractors failed to identify any federal law, treaty provision or provisions of the United States Constitution which would preclude exercise of jurisdiction by the Tribal Court. The Tribal Court opinion was affirmed by the Northern Plains InterTribal Court of Appeals.

A-1 Contractors then brought an action in federal court, requesting this court to issue an order declaring that Tribal Court does not have jurisdiction over the case and enjoin the Fredericks from proceeding against A-1 contractors in Tribal Court.

The issue presented is whether or not the Tribal Court has personal and subject matter jurisdiction over a tort action arising from an automobile accident occurring on the reservation between two non-Indians.

ANALYSIS

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). The evidence is viewed in the light most favorable to the non-moving party and the non-moving party enjoys the benefit of all reasonable inferences to be drawn from the facts. *Id.* at 1339. The mere existence of some alleged factual dispute, however, will not defeat an otherwise properly supported motion for summary judgment if there is no genuine issue of material fact. *Id.* If the moving party meets its initial burden of production with credible evidence which convincingly shows there is no genuine issue of material facts, the opposing party must come forward with specific facts that demonstrate a genuine issue for trial. *Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848, 850 (8th Cir. 1983). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The only factual dispute is whether Gisela Fredericks resides on the reservation. The tribe filed a motion to strike any exhibits relating to the residency status of Fredericks, and urge the court adopt the lower court's findings that Fredericks resides on the reservation. The issue of residency was not raised before the tribal or appellate court. A-1 raises the issue of residency for the first time in this court.

The fact that Fredericks may or may not reside on the reservation is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians. If the court determines that the Tribal Court has jurisdiction over A-1 pursuant to the tribal code, the Tribal Court would necessarily have jurisdiction over Fredericks under a similar analysis. Although both the Tribal Court and the appellate court assumed Fredericks was a resident, it is not relevant in the analysis of whether or not the tribe retains jurisdiction.

Moreover, the tribe's core argument is that tribal jurisdiction is premised upon a geographic territory. The plaintiffs' principal argument is that tribal jurisdiction is only present if at least one of the parties is a member of the tribe. Neither theory depends on the residency of Gisela Fredericks at the time of the accident. Therefore, there is no material factual dispute and the court finds summary judgment to be appropriate disposition of this matter.

In regard to tribal civil jurisdiction over non-Indians, the United States Supreme Court has stated:

Tribal authority over the activities of non-Indians on reservation lands is an important

part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mut. Ins. Co. v. Laplante, 480 U.S. 9, 18 (1987) (citations omitted).

Tribal courts do not have inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Oliphant*, the Supreme Court found that congressional action granting jurisdiction to the federal courts to try non-Indians for offenses committed in Indian Country implicitly preempted tribal jurisdiction. *Id.* at 204. However, the civil jurisdiction of Tribal Court has not been similarly restricted, and the development of the principles governing civil jurisdiction have been different than those governing criminal jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985) (Supreme Court refused to extend *Oliphant* to case involving tribal civil jurisdiction).

In a recent decision regarding tribal criminal jurisdiction, the Supreme Court recognized that Tribal Courts retain civil jurisdiction over disputes involving non-Indians. The court stated that the civil jurisdiction of the tribe over non-Indians typically arises in cases of property ownership within the reservation or "consensual relationships with the tribe or its members through commercial dealing, contracts or other arrangements." *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053, 2061 (1990) (citing *Montana*).

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court found that there were two circumstances

in which a tribe may retain civil jurisdiction over non-members. *Id.* at 565-66. First, a tribe may regulate, through taxation and licensing, activities of non-Indians who enter consensual relationships with the tribe and its members. Secondly, the tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

The Tribal Court determined that a tort committed on the reservation, in the course of a performance of a contract with the tribe, has a direct effect on the welfare of the tribe and thus the second exception to *Montana* was satisfied in this case. The appellate court affirmed, concluding that absent a congressional directive it could find no compelling reason not to give the tribe jurisdiction.

Although the Supreme Court has not reached the issue of tribal civil jurisdiction over two non-Indians, a recent ninth circuit case does indirectly address the matter. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992). In *Stock West*, an Oregon corporation brought an action in federal district court against a tribal attorney who was also a non-Indian, alleging the attorney committed malpractice in drafting an opinion letter.

The district court dismissed the case, finding that the subject matter of the letter involved tribal concerns and that the corporation should first exhaust tribal remedies. The ninth circuit, *en banc*, affirmed, determining the fact that the corporation was non-Indian did not preclude tribal civil jurisdiction. *Id.* at 918. The court concluded

that the best argument against tribal jurisdiction was that the opinion letter was delivered off the reservation. *Id.*

A-1 contends that *Montana* is controlling in this case and precludes Tribal Court jurisdiction over the personal injury action. A-1 argues that this case does not fall within the two exceptions announced in *Montana*. A-1 argues that there are no consensual relationships present in this case and asserts that the alleged tort between non-Indians does not have a direct effect on the health or welfare of the tribe.

— The tribal defendants disagree, arguing that *Montana* only applies in cases of non-Indian fee lands, and this dispute involves an accident which occurred on the reservation. The tribe argues that assuming *Montana* applies, it does allow for jurisdiction in a case of a tort committed on the reservation because of the serious nature of the tort. The tribe argues that because A-1 is performing under a contract with the reservation, it is necessarily subject to tribal jurisdiction for torts committed in the course of performance of that contract on the reservation. Thus, the tribe contends that both prongs of the *Montana* test are satisfied. The tribe notes that A-1 agreed in its contract with the tribal-owned corporation to be bound by the tribal building codes, employment rights codes and "the laws regulations and directives of applicable governing authorities."

A-1 also argues that the burden is on the Fredericks to cite to a treaty or statute which expressly gives the Three Affiliated tribes authority to conduct civil lawsuits

against non-Indians in Tribal Court. The defendants disagree, stating that jurisdiction is presumed unless otherwise limited by treaty or statute.

The applicable tribal code provisions are as follows:

Chapter 1, Section 3: Jurisdiction of the Courts

Subsection 3.2 – Jurisdiction – Territorial

The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Subsection 3.3 – Jurisdiction – Personal

Subject to any limitations or restrictions imposed by the constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Subsection 3.5 – Jurisdiction – Subject Matter

The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2, Section 3(f): Long Arm Statute. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- 1) The transaction of any business of the Reservation;
- 2) The commission of any act which results in accrual of a tort action within the Reservation;
- 3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

The court finds that the Tribal Court was correct when it found that it had jurisdiction over this dispute. The tribal code clearly provides for personal jurisdiction over Fredericks, Stockert and A-1 Contractors. The tribe has jurisdiction over Fredericks because she elected to bring her action in Tribal Court. She exercised a discretionary choice of forum. The tribe has jurisdiction over Stockert because he entered the reservation, and he committed an act which resulted in the accrual of a tort action within the reservation. The tribe has jurisdiction over A-1 Contractors because it entered the Reservation and transacted business on the Reservation.

The tribal code also provides for subject matter jurisdiction over the tort action. Section 3.5 of the code states that "the Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation" The tort action arose within the exterior boundaries of the Reservation and therefore the Tribal Court has subject matter jurisdiction.

The law is clear that Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute. See *Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9 (1987). That jurisdiction is not exclusive. Here it is

invoked by plaintiffs' choice of forum. There has been no such limitation over civil causes of action arising on the reservation between two non-Indians, and therefore, the court **HEREBY DENIES** the plaintiffs' request for relief.

Based on the foregoing, it is the **ORDER** of the court:

1. The Fredericks' motion for summary judgment is **GRANTED**. (doc. #13).
2. The plaintiffs' motion for summary judgment is **DENIED**. (doc. #19).
3. The tribal defendants' cross-motion for summary judgment is **GRANTED**. (doc. #29).
4. The tribal defendants' motion to strike the exhibits is **GRANTED**. (doc. #31).
5. The motions for oral argument are **DENIED**. (doc. # 33, 49)
6. The plaintiffs motion to amend pleadings is **DENIED**. (doc. #43)

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 16th day of September 1992.

/s/ Patrick A Conmy
Patrick A. Conmy, Chief Judge
United States District Court

Civil No. A1-92-24

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 16 day of Sept. 1992.

EDWARD J. KLECKER, CLERK

By: /s/ Deborah Thomason
Deputy

UNITED STATES DISTRICT COURT
SOUTHWESTERN DISTRICT OF NORTH
DIVISION DAKOTA

A-1 Contractors, and Lyle
Stockert,

v.

Honorable William D. Strate,
Associate Tribal Judge of the
Tribal Court of the Three
Affiliated Tribes of the Fort
Berthhold Indian Reservation, et
al.,

JUDGMENT IN A
CIVIL CASE

CASE NUMBER:
A1-92-24

(Filed
Sep. 16, 1992)

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That pursuant to the Memorandum and Order entered this date that Fredericks' motion for summary judgment is GRANTED. The plaintiffs' motion for summary judgment and to amend pleadings is DENIED. The tribal defendants' cross-motion for summary judgment is GRANTED and the motion to strike the exhibits is GRANTED. The motions for oral argument are DENIED. The above entitled action is dismissed with prejudice.

App. 86

September 16, 1992
Date

EDWARD J. KLECKER
Clerk

/s/ Deborah Thomason
(By) Deputy Clerk

App. 87

IN THE
NORTHERN PLAINS INTERTRIBAL
COURT OF APPEALS

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul Jonas)	
Fredericks, Hans Christian)	
Fredericks, Jeb Pius Fredericks,	)	No. CV-06-06-91
Kenneth Lee Fredericks on behalf)	
of Gisela Fredericks; and Gisela)	
Fredericks,)	
Plaintiffs-Appellees,	)	OPINION
vs)	
Continental Western Insurance)	
Company, A-1 Contractors, Lyle	)	(Dated
Stockert,	)	January 8, 1992)
Defendants-Appellants.)	

Appeal From Tribal Court
For The Three Affiliated Tribes
Of The Fort Berthold Indian Reservation

Patrick J. Ward
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Argued by: Michael G.
Fiergola and Mitchell
Mahoney

Thomas A. Dickson
NODLAND & DICKSON
Attorneys for Appellees
P.O. Box 640
Bismarck, ND 58502-0640

Argued by: Ronald A.
Reichert

Statement of the Case

This personal injury lawsuit was commenced in the Fort Berthold Tribal Court as a result of an automobile accident which occurred on the Fort Berthold Indian Reservation, North Dakota on November 9, 1990.

The fundamental issue before this Court is whether the Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action. The parties involved in the accident are non-Indian.

It is the view of this Court that the Fort Berthold Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action, accordingly the trial court's decision is affirmed.

The appellees Motion to Dismiss the appeal is denied as the appeal was timely and the issue of jurisdiction is appealable.

The other issues concerning loss of consortium by adult children and the naming of the insurance company in a tort action are remanded back to the Trial Court for its consideration.

Facts

On November 9, 1990, Gisela Fredericks driving a Honda Civic collided with a gravel truck driven by Lyle Stockert on North Dakota Highway No. 8 north of Twin Buttes, North Dakota. The collision occurred within the exterior boundaries of the Fort Berthold Indian Reservation.

Gisela Fredericks has been a resident of the Fort Berthold Indian Reservation for over 40 years. Mrs. Fredericks is not a member of Three Affiliated Tribes. Her now deceased husband, Kenneth Fredericks Sr. was a life long farmer-rancher on the Fort Berthold Reservation and a member of Three Affiliated Tribes. Mrs. Frederick's five sons and plaintiffs in this action are members of the tribe. Mrs. Fredericks owns real and personal property on the Fort Berthold Indian Reservation.

The gravel truck that was involved in the collision was owned by A-1 Contractors and driven by Lyle Stockert. The truck was insured by Continental Western Insurance Company. At the time of the accident A-1 contractors was hauling gravel on the reservation under a sub-contract agreement with LCM Corporation. LCM Corporation is owned by Three Affiliated Tribes Tribal Government.

Analysis of Law and Fact

To give proper perspective in analyzing the issue of whether the Fort Berthold Tribal Court has jurisdiction over non-Indians involved in a traffic accident on the reservation it is appropriate to give a brief overview of

federal case law regarding civil and criminal jurisdiction of tribal courts.

In *Oliphant v Suquamish Indian Tribes*, 435 U.S. 191 (1978) the Supreme Court held that tribes cannot exercise criminal jurisdiction over non-Indians. The Court reasoned that the exercise of such jurisdiction would be inconsistent with the status of tribes as domestic dependent nations. In *Duro v Reina* 110 S. Ct. 2053 (1990) the Supreme Court has ruled that tribal courts do not have criminal jurisdiction over non-member Indians; also see *Greywater v Joshua* 846 F 2d 486 (8th Circuit 1988). Since *Duro*, Congress and the President have passed a law giving tribal courts criminal jurisdiction over non-member Indians, whether such law passes constitutional muster is questionable; see *Duro and Reid v Covert* 354 U.S. 1 (1957).

In civil actions tribes have sovereign immunity. *Three Affiliated Tribes v Wold Eng'g* 476 U.S. 877 (1986), *Wichita Affiliated Tribes of Oklahoma v Hodel* 788 F 2d 765 (D.C. Circuit 1986).

Regarding personal jurisdiction, state courts do not have jurisdiction over an action arising in Indian Country filed by a non-Indian against an Indian, because state court jurisdiction would interfere with the rights of reservation Indians to make their own laws and be ruled by them *Williams v Lee* 358 U.S. 217 (1959). State courts do not have jurisdiction to hear claims arising in Indian Country when both parties are Indian and civil jurisdiction hasn't been transferred to the state by public law 280 67 Stat. sub. 588 codified as amended 18 U.S.C. sub. 1162 *Fisher v District Court* 424 U.S. 382 (1976). Absent Federal

statutory authority, *Williams* has deprived state courts of civil jurisdiction over Indians in Indian Country. State courts do have civil jurisdiction over actions where an Indian files against a non-Indian even when the cause of action arises in Indian Country *Three Affiliated Tribes v Wold* 476 U.S. 877 (1986). State courts have jurisdiction over suits by non-Indians against non-Indians even when the claim arises in Indian Country, but only if Indian interests are not affected *Williams v Lee* 358 U.S. 217 (1959).

In the area of regulation, tribal governments are limited in their authority over the activities of non-Indians on fee title land on reservations but not totally divested of such authority; *Montana v United States* 450 U.S. 544, *Brendale v Confederated Tribes & Bands* 109 S. Ct. 2994 (1989). "Survey of Civil Jurisdiction in Indian Country 1990" 2 *American Indian Law Review* Fall 1991 gives an excellent overview of Indian civil jurisdiction.

"In general terms jurisdiction is the power to hear and determine a cause of action." *Schillerstrom v Schillerstrom* 32 NW 2d 106, 122 (1948). The concept of jurisdiction is divided into two types: jurisdiction over the subject matter and jurisdiction over the parties. See generally 20 Am. Jur. 2d courts subsection 105 (1965). To properly act in a case, a court must be vested with both jurisdictions *Reliable Inc. v Stutsman County Commission* 409 NW2d 632, 634 (N.D. 1987). "A court has subject matter jurisdiction if it has authority under the constitution and laws, to hear and determine cases of a general class to which a particular action belongs."

The appellants in this action, Continental Western Insurance, A-1 Contractors and Lyle Stockert contend that the Tribal Court does not have jurisdiction over the parties because Gisela Fredericks and Lyle Stockert are non-Indian. Further extending their legal theory, A-1 is not an Indian nor Tribal Corporation.

Supporting their proposition that the Tribal Court does not have jurisdiction over this tort action the parties cite *Montana v United States* 450 U.S. 544. They also cite *Brendale v Confederated Tribes & Bands* 492 U.S. 408. *Montana* states that tribes do not have the authority to regulate hunting and fishing by non-Indians on non-Indian lands. Through their original incorporation into the United States as well as through specific treaties and statutes Indian tribes have lost many of the attributes of sovereignty particularly as it relates to the relations between the tribe and non-members of the tribe. In *Brendale* tribes are limited in zoning fee title lands within a reservation. However, under certain circumstances tribes may place zoning restrictions on fee title property of non-Indians.

It is the opinion of this Court that *Montana* and *Brendale* are not dispositive of the issue before this Court. The regulation of non-Indians and their property with civil, quasi-criminal or criminal penalties is quite different than non-Indians seeking damages in a tort action in Tribal Court. The analysis of determining criminal jurisdiction over non-Indians is not controlling nor the same as the analysis of determining civil jurisdiction *National Farmers Union* 85 L.Ed.2d at 826 footnote 16 & 17.

It is the opinion of this Court that *Williams v Lee* 358 U.S. 217 (1959) along with *Iowa Mutual Insurance Co. v La Plante* 480 U.S. 9 (1987) are controlling in resolving the issue before this Court. In *Williams* the Supreme Court recognized the authority of the Tribal Court to hear disputes between an Indian plaintiff and a non-Indian defendant. The Court stated in *Williams*: "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the defendant is not an Indian. He was on the reservation and the transaction with an Indian took place there." Affirming the reasoning in *Williams* over 25 years later *La Plante* stated that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and civil jurisdiction over such activities presumptively lies in tribal courts unless affirmatively limited by specific treaty provision or federal statute *Iowa Mutual Insurance Co. v LaPlante* 94 L.Ed. 2d 10 at 21.

Although Gisela Fredericks is not a citizen of Three Affiliated Tribes she has been a member of the Fort Berthold community and a resident for many years. Like any sovereign, Three Affiliated Tribes has an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction. Absent Congressional directive this Court can find no compelling reason not to give the Fort Berthold Tribal Court jurisdiction.

Amalgamating Federal case law with regard to tribal civil jurisdiction it is the view of this Court that there is a two pronged inquiry in determining whether a tribal court has jurisdiction. The first prong of inquiry is whether a tribal court is authorized by the governing authority to take jurisdiction. The second prong of inquiry is whether a tribal court is limited in taking jurisdiction by either treaty provision or federal law.

In analyzing the first prong of the inquiry it is necessary to determine what authority was conveyed by Three Affiliated Tribes Tribal Council to Tribal Court. Relevant sections of the Tribal Code are listed.

Chapter 1, Section 3: Jurisdiction of the Courts

Sub-Section 3.1 – Policy

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

Sub-Section 3.2 – Jurisdiction-Territorial

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and overland outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Sub-Section 3.3 – Jurisdiction-Personal

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the court shall have civil and criminal jurisdiction over all persons who *reside,*

enter, or transact business within the territorial boundaries of the Reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Sub-Section 3.5 – Jurisdiction-Subject Matter

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation*, and over all criminal offenses which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2, Section 3 (f): Long Arm Statute [sic].

Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- (1) The transaction of any business of the Reservation;
- (2) The commission of any act which results in accrual of a tort action within the Reservation;
- (3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation, (emphasis added)

It is clear that the Tribal Council gave Tribal Court broad authority to hear civil disputes and did not limit the Court to particular types of actions or persons. There is no limitation in the code excluding non-Indians from seeking relief in a tort action against another non-Indian.

Unlike *Montana* and *Brendale* where an individuals rights and or privileges were being diminished by the tribal governing authority, here they are being expanded. In this case the tribal governing body has extended the

civil justice system to all who are on the Fort Berthold Reservation so that they have the right to seek redress in a court of law when they are not satisfied by offers of settlement or when a party denies liability.

In the second prong of the analysis this Court can find no treaty restrictions or federal statutes prohibiting the tribal court from taking jurisdiction over this case. The tribal court may be limited by the Indian Civil Rights Act, 25 U.S.C. sub.1302; on how it may proceed but it does not create a prohibition on the tribal court in taking jurisdiction; nor has the State of North Dakota taken jurisdiction of this case through Public Law 280; 25 U.S.C. sub. 1321.

It is noted that the parties in this action are all represented by licensed attorneys and the trial judge in this case is a licensed practicing attorney and although the State of North Dakota may have jurisdiction in this matter it is not exclusive. The State is probably prohibited from taking jurisdiction of this matter while this action is pending in Tribal Court *National Farmers Union Insurance Co. v Crow Tribe* 471 U.S. 845.

The Tribal Court is subject to the limitation of minimum contacts in taking jurisdiction *World-Wide Volkswagen Corp. v Woodson* 444 U.S. 286 (1980) *International Shoe Co. v Washington* 326 U.S. 310 (1945). Minimum contacts is not a concern since the automobile accident took place within the boundaries of the reservation. The plaintiff is a resident of the reservation and the defendant Stockert was doing business on the reservation and Continental is Stockert's insurance carrier. The fact that the auto/truck collision occurred on a state highway does not

in and of itself divest the tribal court of jurisdiction *National Farmers Union Co. v Crow Tribe* at 847.

For the reasons set out in this Opinion the decision of the Trial Court is affirmed. The Fort Berthold Tribal Court has jurisdiction over the parties and subject matter in this case.

Other Issues

This Court expresses no opinion as to whether the plaintiffs have a claim for loss of consortium; nor does this Court express an Opinion as to whether Continental Western Insurance should be a named defendant in this tort action. These issues have not been addressed by the Trial Court and it is untimely for this Court to render an Opinion on these issues. Those issues are remanded back to the Trial Court for its consideration.

The Appellees Motion to Dismiss Appeal

The Appellees Motion to Dismiss the Appeal is denied. It is the Opinion of this Court that the issue of jurisdiction is appealable. The Memorandum Opinion of the Trial Court was an Order. Based on the filing date the appellants complied with Appellate Rule 20.

The Trial Court's jurisdiction determination is affirmed. This matter is remanded back to the Trial Court for further proceedings.

App. 98

Dated this 8th day of January, 1992.

OPINION BY:

1-13-92 /s/ Donovan Foughty
Donovan Foughty
Appellate Judge

/s/ Paul Godtland
Paul Godtland
Chief Appellate Judge

/s/ Robert GreyEagle
Robert GreyEagle
Appellate Judge

App. 99

IN THE
NORTHERN PLAINS INTERTRIBAL
COURT OF APPEALS

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul	)	AFFIDAVIT OF
Jonas Fredericks, Hans	)	SERVICE
Christian Fredericks, Jeb Pius	)	BY MAIL
Fredericks, Kenneth Lee)	
Fredericks on behalf of Gisela	)	CASE NUMBER:
Fredericks; and Gisela	)	CV-06-06-91
Fredericks,)	
Plaintiffs-Appellees,)	
vs.)	
Continental Western Insurance)	
Company, A-1 Contractors,)	
Lyle Stockert,)	
Defendants-Appellants.)	

STATE OF SOUTH DAKOTA)
County of Brown) SS.

I, James Bluestone, Jr., COURT ADMINISTRATOR/
APPELLATE COURT CLERK FOR THE NORTHERN
PLAINS INTERTRIBAL COURT OF APPEALS, DEPOSES
AND SAYS:

THAT he is of legal age, a citizen of the United States,
and is not a party to, nor has he have an interest in the
above entitled action; that on 23 day of January, 1992, he
deposited in the United States Post Office, in the City of
Aberdeen, South Dakota, a CERTIFIED COPY of the fol-
lowing document(s):

1. OPINION of Above mentioned case.
- 2.
- 3.

THAT said envelopes was (were) addressed as follows:

Patrick Ward
Michael Fiergola
P.O. Box 1695
Bismarck, ND 58502-1695

Mitchell Mahoney, P.O. Box 1000 Minot, ND 58702-100
Ronald Reichert, Drawer K, Dickinson, ND 58602-8305
Thomas Dickson, P.O. Box 640, Bismarck, ND 58502-0640

✓Urban Bear Don't Walk
Legal Department, TAT
P.O. Box 220 - New Town, ND 58763

Clerk of Courts
Three Affiliated Tribes/Tribal Court
P.O. Box 428 - Mandaree, ND 58757

THAT the the above document(s) was (were) duly mailed
in accordance with the provisions of the NORTHERN
PLAINS INTERTRIBAL COURT OF APPEALS RULES of
Appellate Procedure.

I HEREBY SIGN MY NAME AND AFFIX THE SEAL
OF THE NORTHERN PLAINS INTERTRIBAL COURT OF
APPEALS:

DATED this 23 day of January, 1992

(Seal)

/s/ Edith Likes Eagle
COURT ADMINISTRATOR/
APPELLATE COURT CLERK

IN TRIBAL COURT FORT BERTHOLD RESERVATION
THREE AFFILIATED TRIBES MANDAREE,
NORTH DAKOTA

Lyndon Benedict Fredericks,
Kenneth Lee Fredericks, Paul
Jonas Fredericks, Hans Christian
Fredericks, Jeb Pius Fredericks,
Kenneth Lee Fredericks on
behalf of Gisela Fredericks; and
Gisela Fredericks,

Plaintiff,

vs.

Continental Western Insurance
Company, A-1 Contractors, Lyle
Stockert,

Defendant.

**MEMORANDUM
OPINION**

**CIVIL NO:
5-91-A04-150**

**(Filed
Sep. 4, 1991)**

This matter having come before the Court upon
Defendants', A-1 Contractors and Lyle Stockert, Motion
to Dismiss based upon a lack of personal and subject
matter jurisdiction. The Motion to Dismiss was initially
brought by the Defendant Lyle Stockert and was joined in
by A-1 Contractors. The Defendant Continental Western
Insurance Company has also joined in the Motion to
Dismiss.

The Defendants filed a Memorandum in Support of
Motion to Dismiss dated June 14, 1991. The Motion to
Dismiss was resisted by the Plaintiffs with their filing of a

Brief in Opposition to the Motion to Dismiss dated July 22, 1991. The Defendants then filed a Reply Memorandum in Support of Motion to Dismiss dated August 1, 1991.

The Court, having considered the parties arguments on the Motion to Dismiss and being fully advised in the premises, now issues the following Memorandum Opinion:

Initially, the Court is faced with a somewhat bare record of the facts of this case. None of the parties have submitted affidavits in support of or opposition to the pending Motion. Accordingly, the Court must rely upon the Briefs and Memorandums filed by the parties as well as the pleadings on file with the Court to discern the factual background of this case. From such a review, the Court finds that the following facts are undisputed by the parties for the purpose of this motion:

1. On November 9, 1990, an automobile accident occurred North of Twin Buttes, North Dakota, within the boundaries of the Fort Berthold Reservation, involving vehicles driven by the Plaintiff Gisela Fredericks and the Defendant Lyle Stockert.
2. That neither Lyle Stockert nor Gisela Fredericks are enrolled members of the Three Affiliated Tribes.
3. That the remaining Plaintiffs are the adult children of Gisela Fredericks and are apparently enrolled members of the Three Affiliated Tribes.
4. That at the time the automobile accident occurred, Gisela Fredericks was a resident of the Fort Berthold Reservation and Lyle Stocker was employed by and/or the owner or operator of A-1 Contractors which

at that time was performing work under a sub-contract on a construction project within the boundaries of the Fort Berthold Reservation. The Court assumes, for the purpose of this motion, that the Defendant Continental Western Insurance Company apparently provided coverage for the Defendants' activities within the Reservation boundaries.

As this case is currently postured, the Plaintiff Gisela Fredericks, a nonmember of the Three Affiliated Tribes, has consented to the jurisdiction of the Tribal Court by filing this action in the Tribal Court and seeking to prosecute her claims within the Tribal Court system. However, the Defendants have all filed special appearances resisting the jurisdiction of this Court.

In considering the present Motion, the Court is guided by the following provisions of the Tribal Code:

CHAPTER 1, SECTION 3: JURISDICTION OF THE COURTS

SUB-SECTION 3.1 - POLICY

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

SUB-SECTION 3.2 - JURISDICTION-TERRITORIAL

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee

patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

SUB-SECTION 3.3 - JURISDICTION-PERSONAL

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who *reside, enter, or transact business within the territorial boundaries of the Reservation*; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law. (Definition omitted)

SUB-SECTION 3.5 - JURISDICTION-SUBJECT MATTER

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation*, and over all criminal offense which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

CHAPTER 2, SECTION 3 (f): LONG ARM STATUTE. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- (1) The transaction of any business of the Reservation;
- (2) The commission of any act which results in accrual of a tort action within the Reservation;
- (3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

(emphasis added)

Applying these code sections to the undisputed facts of this case, it is clear that the Court has jurisdiction over the Plaintiff Gisela Fredericks. As a resident of the Fort Berthold Reservation, she is entitled to avail herself of the Tribal Court system to prosecute any claims which may arise within the Reservation boundaries. The claims of the remaining Plaintiffs, as enrolled members, are also within the jurisdiction of the Tribal Court.

Similarly, it is clear that the Defendants are also subject to the jurisdiction of this Court. The Defendants have entered upon and transacted business within the territorial boundaries of the Reservation. As such, they have entered into consensual relationships with the Tribe and its members. The automobile accident occurred within the Reservation boundaries while the Defendant was engaged in the conduct of business on the Reservation.

The Defendants cite the case of *Montana vs. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981) as authority for the dismissal of this action. However, that case is distinguishable from the present case as it involved what was essentially criminal sanctions imposed upon nonmembers for violation of Tribal hunting and fishing codes. In addition, the facts in *Montana* dealt with activity on State-owned land within the Reservation, a fact situation not present in the instant case.

The Court in *Montana* specifically recognized that Indian Tribes retain civil authority over the conduct of non-Indians within the Reservation. The commission of a tort, as alleged in the Complaint, certainly is an act which has a direct effect on the economic security, health and

welfare of the Tribes and its members. See *Montana* at 450 U.S. 565, 566. Further, as the tort alleged in the Complaint arises out of the Defendant's consensual business activity within the Reservation. The Court's ruling in *Montana* does not bar the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs. In fact, the claim presented by the Plaintiffs appear to be precisely the type of civil actions the *Montana* Court recognizes as being subject to Tribal jurisdiction.

In any event, since the entry of the *Montana* decision, the Supreme Court has continued to recognize and affirm the exercise of civil jurisdiction by Tribal Courts over the activity of non-Indians on Reservation land as an important aspect of Tribal sovereignty and it has held that such jurisdiction over these consensual activities directly affecting the welfare of the Tribes, its members and Reservation residents presumptively lie with the Tribal Courts unless affirmatively limited by specific treaty provisions or federal statutes. See, generally, *Dura vs. Reina*, 110 S.Ct. 2053 (1990); *Iowa Mutual Insurance Company vs. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987); *Nat. Farmers Union Ins. Co. vs. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985).

Accordingly, the Court finds that the Tribal Court has jurisdiction over the Plaintiff Gisela Fredericks based upon her status as a resident of the Reservation and over the Defendants due to their voluntary and consensual acts of entering upon and transacting business within the boundaries of the Fort Berthold Reservation. The Court finds that these activities are not "de minimus" and the assertion of Tribal Court jurisdiction does not offend traditional concepts of due process so as to render the

exercise of jurisdiction by this Court violative of the due process provisions of the United States Constitution. The Defendants have failed to identify any federal laws, treaty provisions or provisions of the United States Constitution which would preclude the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs.

As the Court determines that it has jurisdiction over the non-Tribal member parties, specifically, Plaintiff Gisela Fredericks and Defendants Lyle Stockert, A-1 Contractors, and Continental Western Insurance Company, the Court does not address nor express any opinion concerning the consortium claims brought by the adult children of the Plaintiff Gisela Fredericks. The status of Gisela Fredericks as a resident of the Fort Berthold Reservation and the consensual relationships established by the Defendants by entering upon and transacting business within the Reservation boundaries together with the alleged tort occurring within the Reservation are sufficient to establish the jurisdiction of this Court.

Accordingly, the Motion to Dismiss is DENIED.

Dated this 4th day of September, 1991.

BY THE COURT:

/s/ William L. Strate
Associate Tribal Judge

(1.24e)

IN TRIBAL COURT FORT BERTHOLD RESERVATION

THREE AFFILIATED TRIBES

MANDAREE,
NORTH DAKOTA

Lyndon Benedict Fredericks,)
 Kenneth Lee Fredericks, Paul)
 Jonas Fredericks, Hans Christian)
 Fredericks, Jeb Pius Fredericks,)
 Kenneth Lee Fredericks on)
 behalf of Gesela Fredericks; and)
 Gisela Fredericks,)

Plaintiffs)

vs.)

Continental Western Insurance)
 Company, A-1 Contractors,)
 Lyle Stockert,)

Defendants.)

CIVIL No.
5-91-A04-150

AFFIDAVIT OF SERVICES BY MAIL

STATE OF NORTH DAKOTA)
 COUNTY OF MCKENZIE)

FayAnn Moberg, being first duly sworn, deposes and
 says that on the 5th day of September, 1991, she served
 the attached Memorandum Opinion up Mitchell
 Mahoney, Pat Ward and Thomas Dickson, by placing a
 true and correct copy thereof in envelopes addressed as
 follows:

Mitchell Mahoney
 PRINGLE & HERISTAD, P.C.
 PO Box 1000
 Minot, ND 58702

Pat Ward
 ZUGER, KIRMIS, BOLINSKY
 & SMITH
 PO Box 1695
 Bismarck, ND 58502

Thomas Dickson
 NODLAND, THARALDSON
 & DICKSON
 PO Box 640
 Bismarck, ND 58502

and depositing the same, with postage prepaid, in the
 United States Post Office at Mandaree, North Dakota.

/s/ FayAnn Moberg
 FayAnn Moberg,
 Clerk of Court

Subscribed and sworn to before me this 5th day of Sep-
 tember, 1991.

(SEAL)

/s/ Curtis M. Young Bear, Jr.
 Notary Public
 My Commission Expires:
 CURTIS M. YOUNG BEAR, JR.
 STATE OF NORTH DAKOTA
 Expires May 20, 1994

(2)

JUN 20 1996

No. 95-1872

CLERK

In The
Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, Associate
Tribal Judge of the Tribal Court of the Three Affiliated
Tribes of the Fort Berthold Indian Reservation; THE
TRIBAL COURT OF THE THREE AFFILIATED TRIBES
OF THE FORT BERTHOLD INDIAN RESERVATION;
LYNDON BENEDICT FREDERICKS; KENNETH LEE
FREDERICKS; PAUL JONAS FREDERICKS; HANS
CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS;
GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly analyzed the issue of tribal civil jurisdiction under the rule of *Montana v. United States*, 450 U.S. 544 (1981), in refusing to allow tribal court jurisdiction over a tort action between two non-Indians arising on a North Dakota state highway within the geographical confines of the Fort Berthold Indian Reservation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
REASONS THE WRIT SHOULD BE DENIED.....	4
1. THIS CASE DOES NOT PRESENT UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION.....	4
A. <i>Montana</i> clearly limits tribal power over non-Indians	4
B. <i>Iowa Mutual</i> , when read properly, is consistent with <i>Montana</i>	6
2. THE COURT OF APPEALS' EN BANC OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVEREIGNTY OVER THE ACTIONS OF NON-INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS.....	9
3. THE COURT OF APPEALS' EN BANC OPINION DOES NOT CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT	12
4. THE COURT OF APPEALS CORRECTLY APPLIED THE TWO PART MONTANA TRIBAL INTEREST TEST	14

TABLE OF CONTENTS - Continued

	Page
A. The "consensual relationship" exception does not apply	14
B. The "direct effect" exception does not apply.....	16
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	5, 6, 10
<i>County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	5
<i>Duro v. Reina</i> , 495 U.S. 676 (1990).....	5, 16, 17
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991)	11
<i>Hinshaw v. Mahler</i> , 42 F.3d 1173 (9th Cir. 1994), cert denied, 115 S. Ct. 485 (1994)	12, 13
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9 (1987)	passim
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	passim
<i>National Farmers Union Insurance Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	9, 10
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993)	5, 10, 16, 17
<i>Stock West Corp. v. Taylor</i> , 964 F.2d 912 (9th Cir. 1992) (en banc).....	11
<i>Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida</i> , 999 F.2d 503 (11th Cir. 1993).....	11
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	5

STATUTES

25 U.S.C. § 1301(2) & (3)	5
25 U.S.C. § 1302(8)	2
Code of Laws, Three Affiliated Tribes, Fort Berthold Reservation, Code of Civil Procedure, § 8(c)	2

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the *en banc* judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on February 16, 1996.

STATEMENT OF THE CASE

This is a personal injury action that was brought in the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota (hereinafter "Tribal Court").¹ The action arises out of a traffic accident that occurred between two non-Indians on a state highway within the exterior boundaries of the Fort Berthold Indian Reservation (hereinafter "Reservation").

¹ Petitioners' Statement of the Case contains numerous factual statements which are not a part of the record developed by any of the courts. While not particularly relevant, these assertions should not be treated as fact. The original motion to dismiss in Tribal Court was based on the jurisdictional questions only. No finding of fact or factual record was prepared at any time. In particular, portions of the information asserted in Footnote 1 and all of the assertions in Footnotes 3 and 5 of the Petition have absolutely no basis in the record. Furthermore, Petitioners' Petition also asserts as fact various assertions which, pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States, will be clarified elsewhere in this brief, where necessary.

On November 9, 1990, Lyle Stockert (hereinafter "Stockert") was driving a gravel truck owned by A-1 Contractors (hereinafter "A-1"). He was traveling in the northbound lane on North Dakota Highway No. 8, near Twin Buttes, North Dakota, which is in the exterior boundaries of the Reservation. Gisela Fredericks was traveling south and abruptly started to make a left turn in front of Stockert in his northbound lane. Stockert tried to avoid a collision with Fredericks by braking and turning his truck toward the right-hand ditch. Gisela Fredericks was injured when her vehicle struck the rear driver's side of the truck. Even though neither she nor Stockert are Indians, Mrs. Fredericks initiated an action against Stockert and A-1 in Tribal Court² seeking in excess of 13 million dollars.³

² There is no question that the State of North Dakota would have jurisdiction over this tort lawsuit and is the proper forum. (Appendix of Petitioners' Petition at 82) (hereinafter App.). The Fredericks filing of this suit in Tribal Court is an apparent attempt to overcome difficult facts by taking advantage of family and personal connections with enrolled members of the reservation by having the case tried in a jurisdiction where Lyle Stockert and his peers are outsiders, precluded by rule from even sitting on the jury panel. Code of Laws, Three Affiliated Tribes, Fort Berthold Reservation, Code of Civil Procedure § 8(c). This raises potential equal protection and due process questions under 25 U.S.C. § 1302(8), which would be raised if the matter was allowed to proceed in Tribal Court.

³ The Petitioners' Petition for a Writ of Certiorari suggests that Mrs. Fredericks sought \$1,000,000 for her personal injuries and her children sought \$1,000,000 for loss of consortium. (Petitioners' Petition for a Writ of Certiorari at 5) (hereinafter Petition). However, they also sought recovery of in excess of \$10,000,000 in punitive damages. (App. at 52).

The proceedings in the Tribal Court, Tribal Appellate Court, Federal District Court, Eighth Circuit Court of Appeals three judge panel and the decision of the *en banc* Court are appropriately outlined in Petitioners' Petition.

The relevant facts of this case are quite simple. Stockert is non-Indian and resides off the reservation; A-1 is a non-Indian owned business with its principal place of business off the Reservation. Gisela Fredericks is also non-Indian.⁴ She was married to an Indian who is now deceased. Their adult children are enrolled members of the Tribe. Thus, none of the relevant parties⁵ are enrolled members of the tribe, and all are citizens of the State of North Dakota.

The specific question addressed and answered by the Eighth Circuit Court of Appeals *en banc* was whether an

⁴ Although Petitioners assert as fact that Gisela Fredericks was a Reservation resident for 40 years (Petition at 4) a factual dispute was never resolved as to whether or not Gisela Fredericks resided on the Reservation at the time of the accident. The federal district court, while noting the factual dispute, found that the question "is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians." (App. at 77). The motion for dismissal in the Tribal Court was based only on the pleadings and no finding of fact or factual record was made at any time in the proceedings below.

⁵ The fact that Gisela Fredericks sons, who are allegedly Indians, are named plaintiffs, does not confer civil jurisdiction with the tribal court. The sons' consortium claims are not recognized causes of actions and are derivative rather than independent causes of action. The tribal court refused to express an opinion on whether there was jurisdiction over these claims. (Petition at 6 n.6) This issue is not before this Court nor relevant to its determination.

American Indian Tribal Court has subject matter jurisdiction over a tort case which arose out of an automobile accident which occurred between two non-Indian parties on an Indian reservation.

REASONS THE WRIT SHOULD BE DENIED

1. THIS CASE DOES NOT PRESENT UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION

A. *Montana* clearly limits tribal power over non-Indians

The Petitioners mistakenly assert that this Court's cases set forth different and conflicting rules for determining whether an Indian Tribe has civil jurisdiction over the activities of non-Indians within the boundaries of an Indian reservation. However, as the Eighth Circuit opinion so eloquently pointed out, that is simply not the case.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court held, without qualification, that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564 (citations omitted) (emphasis added). The *Montana* Court then outlined two sets of circumstances wherein a tribe may exercise some power over non-Indians. First,

the Court noted that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565 (citations omitted). Secondly, the Court held that a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

Indeed, this Court has reiterated repeatedly that the sovereignty of the Indian tribes is of a unique and limited nature. *Duro v. Reina*, 495 U.S. 676, 685 (1990) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978), overruled by statute on other grounds, 25 U.S.C. § 1301(2) & (3)).

Moreover, as the *en banc* decision notes this Court has reiterated or reaffirmed the *Montana* analysis of civil jurisdiction over non-Indians a number of times. (App. at 9-10) (citing *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 267 (1992); *Duro*, 495 U.S. at 687-88, overruled by statute on other grounds, 25 U.S.C. § 1301(2)&(3); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality)).

This Court's most emphatic reiteration of the concept of general divestiture outlined in *Montana* appears in its recent statement that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation', and is therefore *not* inherent."

Bourland, 508 U.S. 679, 695 n.15 (quoting, in part, *Montana*, 450 U.S. at 564) (emphasis in original).

B. *Iowa Mutual*, when read properly, is consistent with *Montana*

In the face of this clear rule of general divestment of tribal civil jurisdiction absent express congressional authorization the Petitioners assert that this analysis conflicts with the *Iowa Mutual*⁶ "rule."⁷ The specific holding or "rule" in *Iowa Mutual* is that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction.⁸ *Iowa Mutual*, 480 U.S. at 18-19.⁹ In addressing the exhaustion question, the Court made the following observation:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United*

⁶ *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

⁷ The Petitioners, after citing the *Iowa Mutual* case indicate that all future references to the case in their Petition will be to "the *Iowa Mutual* rule." (Petition at 8). Although, Petitioners' attempt to portray some isolated language from *Iowa Mutual* as a "rule" their erroneous characterization does not make it so.

⁸ The *Iowa Mutual* rule of exhaustion of tribal remedies was followed by respondents in first bringing the issue of tribal court jurisdiction to the tribal court and exhausting the tribal appeal process before bringing the matter to federal district court.

⁹ See also *Brendale*, 492 U.S. at 427 n.10 (wherein the plurality specifically noted that *Iowa Mutual* only established an exhaustion rule and did not determine whether the tribe had jurisdiction over nonmembers).

States, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18 (emphasis added).

The Petitioners put too much emphasis upon this language and effectively nullify and contradict *Montana* in arguing that Indian tribes retain unfettered geographic and territorial civil jurisdiction unless that jurisdiction has been expressly limited by federal statute or treaty.

Thus, the Petitioners, by elevating this dicta in *Iowa Mutual* to a "rule" of presumptive jurisdiction absent express congressional divestment, essentially throw out the *Montana* baby with the bathwater. However, their argument is misguided for several reasons.

First and foremost, it must be emphasized that *Iowa Mutual* was simply an exhaustion case. It did not decide nor determine the broader question of civil jurisdiction. See *Brendale*, 492 U.S. at 427 n.10. As such, Petitioners' assertion that there is even an "*Iowa Mutual* rule" of presumptive tribal civil jurisdiction absent express congressional divestment is wrong. The *Iowa Mutual* case did not create such a rule either expressly or impliedly. As such, there is no conflict with *Montana* as Petitioners assert.

More importantly, as the *en banc* decision correctly points out, the language in *Iowa Mutual*, which the Petitioners rely on, "can and should be read more narrowly and in harmony with the principles set forth in *Montana*,

which the Court cites in making those observations." (App. at 11).

In explaining how *Iowa Mutual* should be read in harmony with *Montana* the Court of Appeals noted:

When the Court observes in *Iowa Mutual* that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. . . . Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

(App. at 12).

Iowa Mutual can and should be read only within the parameters of its recognition of the limitations on tribal court jurisdiction over non-Indians outlined so clearly in *Montana*. As the Eighth Circuit noted, a careful reading of the *Montana* and *Iowa Mutual* cases indicate that they can and should be read together to establish one comprehensive and integrated rule:

a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(App. at 18).

This comprehensive and integrated rule demonstrates that there is no unresolved question of federal law and, as such, the writ should be denied.

2. THE COURT OF APPEALS' EN BANC OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVEREIGNTY OVER THE ACTIONS OF NON-INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS

The Petitioners incorrectly assert that the *en banc* opinion is in conflict with *Iowa Mutual* and *National Farmers Union*¹⁰ because those cases allegedly established¹¹ a presumption of tribal civil jurisdiction absent specific divestiture by treaty or federal statute. Arguing from this incorrect reading of those two cases, they then

¹⁰ *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

¹¹ As pointed out above these cases did not establish a rule of presumptive tribal civil jurisdiction absent express divestment, but were limited to the issue of requiring exhaustion of tribal court remedies prior to seeking review in federal court.

assert that the holdings of *Montana*, *Brendale*, and *Bourland* are strictly limited to disputes relating to a tribe's ability to exercise authority over non-Indians' activities on non-Indian fee lands¹² or disputes addressing tribal regulatory power over non-Indians as opposed to tribal adjudicatory power over non-Indians. Petitioners then conclude, the *en banc* opinion conflicts with the holdings of *Iowa Mutual* and *National Farmers Union* by applying the *Montana* analytical framework to a dispute involving non-fee lands and a question of adjudicatory power. In fact, there is absolutely no error in the *en banc* application of *Montana* to this dispute. Only a misreading of *Iowa Mutual* could lead Petitioners to such a conclusion.

While both *Montana* and *Brendale* involve questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case in any way limits its discussion, rationale or holding to issues arising on fee lands. Instead, *Montana* specifically found, without qualification or caveat, that *tribal power* itself is limited to what is necessary to protect tribal self government and to control internal relations, absent express congressional delegation of more expansive authority. *Montana*, 450 U.S. at 564. Furthermore, *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and outlined the two limited situations wherein that jurisdiction may apply. *Id.* at 565 (emphasis added). The Court did not limit its rationale to cases arising on

¹² Fee lands are plots of land located within the exterior boundaries of the reservation but which are owned by individuals in fee simple.

non-Indian fee lands but was referring broadly to tribal power over non-members.

Moreover, as the Court of Appeals aptly notes in the *en banc* decision "a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*." (App. at 16) (citing *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (*en banc*); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993). The *en banc* decision correctly notes that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of those two cases." (App. at 16).

In addition, the Petitioners attempt to limit *Montana* and its progeny to cases involving regulatory power versus adjudicatory power is without any basis in any of the cases. In fact, "those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction." (App. at 17). Moreover, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to factual situations regarding regulatory jurisdiction.¹³ (App. at 17) (citing *Iowa Mutual*, 480 U.S. at 18).

¹³ The *en banc* opinion aptly indicates that Petitioners' attempt to apply such a distinction is, in this case, illusory since if the tribal court tried this suit it would essentially be acting in both an adjudicatory and regulatory capacity. (App. at 17).

The Petitioners attempt to suggest that a conflict exists between the *en banc* opinion and this Court's previous rulings based on the argument that the *Montana* analytical framework only applies to fee land disputes or disputes relating to regulatory functions is misplaced. It certainly does not support a basis for this Court's granting the writ.

3. THE COURT OF APPEALS' EN BANC OPINION DOES NOT CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Petitioners assert that the *en banc* opinion of the Eighth Circuit Court of Appeals below is contrary to the Ninth Circuit Court of Appeals decision of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *cert denied*, 115 S. Ct. 485 (1994). However, there are important factual and other distinctions which clearly distinguish *Hinshaw* from this case.

In *Hinshaw*, Christian Mahler was killed when the motorcycle he was driving was struck by a car being driven by Lynette Hinshaw. Christian Mahler was not an enrolled member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation although he did reside on the reservation with his parents, Gloria and Kenneth Mahler. Lynette Hinshaw was not an enrolled member of the Tribes but she also resided on the reservation. Gloria Mahler, Christian's mother, was an enrolled member of the Tribes.

Gloria and Kenneth Mahler filed an action for damages against Hinshaw in the tribal court. Hinshaw

appeared specially to contest jurisdiction. "The Tribal Court denied her motion to dismiss, and found jurisdiction because the accident occurred on the reservation and Gloria Mahler was an enrolled member of the Tribes."¹⁴ *Hinshaw*, 42 F.3d at 1180 (emphasis added). Hinshaw appealed to the Tribal Appellate Court, which affirmed the tribal court's decision.

The Ninth Circuit addressed the jurisdiction of the tribal court over the action. The court specifically noted that *Hinshaw's* actions injured Gloria Mahler, a tribal member. *Hinshaw*, 43 F.3d at 1180.

As such, it was Gloria Mahler's status as an enrolled member of the Tribes which the Ninth Circuit relied upon in finding the existence of tribal jurisdiction. The court also emphasized that *all* parties resided on the reservation. As such, *Hinshaw* is not in conflict with the *en banc* decision of the Eighth Circuit.¹⁵ Therefore, there is no conflict among the Circuits and the Petition should be denied.

¹⁴ It is evident that the tribal court itself relied heavily on the fact that Gloria Mahler was an enrolled member of the Tribes. This in itself distinguishes *Hinshaw* from the present case.

¹⁵ Contrary to the *Hinshaw* opinion, in this case the Petitioners have never claimed that the tribal court has exclusive jurisdiction over this action. Instead, they appear to acknowledge that the North Dakota state courts have at least concurrent jurisdiction. (Petition at 6 n.7).

4. THE COURT OF APPEALS CORRECTLY APPLIED THE TWO PART MONTANA TRIBAL INTEREST TEST

The *Montana* tribal interest test sets forth the two instances wherein the tribes may retain civil jurisdiction over non-Indians. These include the "consensual relationship" test and the "direct effect" test.

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

A. The "Consensual Relationship" exception does not apply

The Petitioners argue that the consensual relationship test is satisfied in this case because A-1 entered into a landscaping subcontract with LCM, a subsidiary of the Tribe, to perform work on a tribal community building.

They argue Stockert was on the reservation in furtherance of that subcontract when the accident occurred.¹⁶

The Court of Appeals rejected that argument. The *en banc* decision notes this is a simple personal injury lawsuit initiated by a non-Indian against another non-Indian arising out of a vehicular accident which happened to occur within the geographical confines of the reservation. The personal injury action was brought by a non-Indian, Gisela Fredericks, not the Three Affiliated Tribes. The tribe was not a party to the personal injury action and any consensual relationship between the Respondents and the tribe is not the subject of this case. As such, the *Montana* consensual relationship test is not satisfied.

Put quite simply, the dispute in this case arises from a simple automobile accident between two non-Indians and does not arise under the terms of, out of, or within the ambit of the "consensual relationship" which may have existed with the tribe. To suggest, as the Petitioners do, that this meets the *Montana* "consensual relationship" test is an unsupported, unwarranted, and, indeed, unwanted, result. If the tribes could obtain unlimited civil jurisdiction, relating to any matter or dispute, over a party who entered into a commercial relationship with the tribe then third parties' willingness to enter into any

¹⁶ As Judge Hansen points out "[t]here is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident." (App. at 3 n.1). The LCM contract, though never formally made a part of the record, provides for adjudication of disputes between A1 and LCM under Utah law in Utah courts. (App. at 21 n.5).

commercial arrangements with a tribe will be significantly curtailed. Clearly, LCM and A-1 sought to avoid such a problem by agreeing to abide by Utah law.

B. The "direct effect" exception does not apply

The Petitioners also argue that the "direct effect" test, as outlined in *Montana*, is satisfied in this case. *Montana* indicates that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on the reservation when that conduct has some *direct effect* on the tribes' political integrity, economic security, or health and welfare.

In this case, the Petitioners argue that the tribes' interest in asserting its sovereign authority over events that occurred within the geographical boundaries of the reservation is, in and of itself, sufficient to meet the direct effect test outlined in *Montana*. However, such a broad ruling would completely ignore the previous dictates of this Court.

In *Duro*, the Court stated that while a "basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory . . . the tribes can no longer be described as sovereigns in this sense." *Duro*, 495 U.S. at 685. Indeed, such an application of the direct effect test would also conflict with this Court's decision in *Bourland*. In *Bourland*, the Court noted that "the reality [is] that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore not

inherent." *Bourland*, 508 U.S. at 695 n.15 (citation omitted) (emphasis in original).

As the *en banc* decision notes "this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception." (App. at 22). Any other result would render meaningless this Court's previous rulings including *Montana*, *Duro*, and *Bourland*. As noted in the Court of Appeals' decision, this case "is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory." (App. at 24).

CONCLUSION

For the reasons outlined above, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the *en banc* judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1995

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of the Fort Berthold Indian Reservation; THE TRIBAL
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**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

REPLY TO BRIEF IN OPPOSITION

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Respondents' Brief in Opposition merely intones the majority opinion of the Court of Appeals below and fails to rebut the key reasons presented by the Petition for granting *Certiorari* in this case. Those reasons are the confusion surrounding application of this Court's decisions and the legal principles intrinsic to those decisions;¹ the conflict between the majority opinion of the Court of Appeals below and the decisions of this Court; and conflict between the majority opinion of the Court of Appeals below and decisions of the Court of Appeals for the Ninth Circuit. In this Reply Brief, Petitioners address specific arguments and points raised by Respondents.

1. Respondents contend (Respondents' Brief in Opposition at 5-6) (hereinafter "Resp. Br."), and the Court of Appeals below held (App. 13), that a rule of general and implicit divestiture of tribal civil jurisdiction over non-Indians was established in *Montana v. United States*, 450 U.S. 544 (1981). This claim flies in the face of the express refusal by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854 (1985), to extend to the civil arena the rule in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes have been generally and implicitly divested of criminal jurisdiction over non-Indians.² The Court in

¹ The issues presented in the Petition continue to vex lower courts. In the case of *Wilson v. Marchington and Inland Empire Shows*, No. CV-92-127 GF (D. Mont. Nov. 8, 1995), *appeal docketed*, No. 96-35145 (9th Cir. Jan. 30, 1996), the district court found that a tribal court has jurisdiction under federal law to hear a tort claim against a non-Indian who, while traveling on a road within an Indian reservation, was involved in an accident with a member of the tribe. The district court wanted to adopt the argument that this Court's cases have found tribal civil jurisdiction over the activities of non-Indians on Indian land to have been "generally and implicitly" divested. However, the court felt compelled to honor the holding of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 485 (1994), that tribal civil jurisdiction on Indian land, even over non-Indian activities, can be defeated only by an express act of Congress.

² The position of Respondents cannot even be reconciled with *Montana*, where this Court held, *inter alia*, that the Tribe in that case "may

National Farmers "conclude[d] that the answer to the question whether a tribal court has the power to exercise civil jurisdiction over non-Indians . . . is not automatically foreclosed, as an extension of *Oliphant* would require." *National Farmers*, 471 U.S. at 855.³ There is, therefore, confusion and conflict over whether *Montana* accomplished a general and implicit divestiture of tribal jurisdiction over the activities of non-Indians on Indian land.

2. Contrary to Respondents' assertion, the Petition does not attempt to distinguish the present case from the *Montana*, *Brendale*⁴, and *Bourland*⁵ cases on the basis of any purported regulatory/adjudicatory distinction. Petitioners argue that these cases are distinguishable because they contain three essential elements not present in the case *sub judice*: 1) land taken from a tribe by Congress for non-Indian ownership or occupation; 2) conduct of the non-Indians on the fee or taken land which posed no threat to the welfare of a tribe; and 3) a conflict between a tribe and a state or federal agency over competing regulatory jurisdiction. (Petition at 11). Respondents distort this argument into one claiming that the three cited cases "are strictly limited to . . . disputes addressing tribal regulatory power over non-Indians as opposed to tribal adjudicatory power over non-Indians," (Resp. Br. at 10).

3. Petitioners concede that the *Montana* "tribal interests test"⁶ applies to activities of non-Indians on their fee lands.

prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe. . . ." *Montana*, 450 U.S. at 557 (citation omitted).

³ Nor is *National Farmers* a mere exhaustion case. If *Montana* accomplished a general divestment, there would have been no reason to establish the tribal exhaustion requirement. "If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed. . . ." 471 U.S. at 854.

⁴ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

⁵ *South Dakota v. Bourland*, 508 U.S. 679 (1993).

⁶ Set out in the Petition at 9.

Respondents, however, argue that the tribal interests test applies on non-fee lands – i.e., Indian lands. Respondents cite three Court of Appeals cases,⁷ none of which support this conclusion. (Resp. Br. at 11).

The legal issue in *Stock West* was whether a federal court should abstain in favor of a tribal court so that tribal remedies could be exhausted. A key factual issue was whether the alleged activity giving rise to the underlying dispute arose on Indian land. Because the Court of Appeals required exhaustion, the federal courts had no occasion to reach either the issue of tribal jurisdiction on the merits or the applicability of the "tribal interests test."

FMC indisputably involved tribal jurisdiction over the activities of non-Indians on fee lands and the court found that the Tribe had jurisdiction.

Tamiami cites *Montana* in a footnote on a matter related to tribal sovereign immunity stating that "[t]he Supreme Court has continuously acknowledged tribal courts' inherent power to exercise civil jurisdiction over non-Indians in conflicts affecting the interests of Indians on Indian lands."

Plainly, these cases do not support the position, advanced by Respondents (Resp. Br. at 11) and the Court of Appeals below (App. 16), that other courts have relied upon or cited *Montana* in jurisdictional disputes involving Indian lands. And, assuming *arguendo* that they did, such decisions would further serve to highlight the conflict with other cases which have held the opposite. See, e.g., Petition at 13-15; see also *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (where the court observed in a contract action by an Indian tribe against a tribal member and a non-Indian that, "[s]trictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has

⁷ *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993).

been a general divestiture of tribal authority over non-Indians by alienation of the land.").

4. Respondents make a number of additional assertions which touch only tangentially on the issue of whether this Court should accept *certiorari*. Petitioners nevertheless address these assertions here to ensure that should *certiorari* be granted, Petitioners' position will be preserved.

a. Respondents claim that there is no question that the State of North Dakota would have jurisdiction over this case and that state court is the proper forum for the lawsuit. (Resp. Br. at 2 n.2). While Petitioners agree that there may be concurrent jurisdiction, the issue of state court jurisdiction is clearly not before the Court in this case.

b. Respondents claim that the finding of the federal district court that Lyle Stockert, the driver for and part owner of A-1 Contractors, was within the scope of his employment at the time of the accident (App. 74), was "modified" by the Court of Appeals. (Resp. Br. at 15). A court of appeals may not substitute its judgment for that of a district court on a finding of fact unless the factual finding is clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985). No such determination was made by the Court of Appeals below. Furthermore, if a district court's factual finding is inadequate, a court of appeals may not find the fact on its own but must remand with directions to make appropriate findings. *Fogarty v. Piper*, 767 F.2d 513, 515 (8th Cir. 1985). Moreover, as a matter of law the issue of whether Stockert was within the scope of his employment at the time of the accident is relevant to liability, not tribal jurisdiction. See, e.g., *Breeding v. Massey*, 378 F.2d 171 (8th Cir. 1967).

c. Respondents note that Petitioners (the Fredericks) originally sought \$10,000,000 in punitive damages in this case. (Resp. Br. at 2 n.3). While that is correct, it is irrelevant and was, in any event, dropped by Petitioners with the dismissal of Continental Western Insurance Company from the case. Respondents' unfounded claim that this case was brought in tribal court to take advantage of family and personal connections (Resp. Br. at 2 n.2), is the basest sort of speculation, and should be ignored.

d. Respondents claim that if a government may exercise jurisdiction over those who voluntarily enter into contracts with it, this would lead to the unwillingness of nonresidents of the jurisdiction to enter into agreements with that sovereign. (Resp. Br. at 15-16). This claim is entirely speculative, devoid of any support in the record, and defies common sense. Even if true, the decision about such contracts would be one of policy for the sovereign, it would not defeat jurisdiction. Respondents further claim that LCM (the tribal corporation) and A-1 included a clause in their contract - which is not a part of the record - agreeing to abide by the law of a foreign jurisdiction for the purpose of avoiding such "problems". (Resp. Br. at 16). This desperate claim is the sheerest speculation and should also be ignored.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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July 12, 1996

SEP 28 1996

CLERK

In The
Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, ASSOCIATE
TRIBAL JUDGE OF THE TRIBAL COURT OF THE THREE
AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN
RESERVATION; THE TRIBAL COURT OF THE THREE
AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN
RESERVATION; LYNDON BENEDICT FREDERICKS;
KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS;
HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS;
GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONERS' SUPPLEMENTAL BRIEF

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Honorable William Strate,
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the Tribal Court of the
Three Affiliated Tribes of
The Fort Berthold Indian
Reservation, and The Tribal
Court of the Three Affiliated
Tribes of the Fort Berthold
Indian Reservation*

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Hans Christian Fredericks,
Jeb Pius Fredericks, and
Gisela Fredericks*

PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 15.8, Petitioners file this Supplemental Brief to call the Court's attention to the recent decision of the United States Court of Appeals for the Ninth Circuit in *Yellowstone County v. Pease*, No. 95-36026, 1996 WL 512363 (9th Cir. Sept. 11, 1996) (*Pease*). *Pease* is relevant to consideration of the petition for *certiorari* in this case as follows.

1. *Pease* exemplifies the confusion over the *Montana* rule.¹ The court in *Pease* is apparently of the view that the *Montana* rule applies to the activities of non-Indians anywhere within an Indian reservation, regardless of the status of the land on which the activities occur. *Pease*, 1996 WL 512363, at *5. This is inconsistent with *Montana*, which expressly distinguished between "land belonging to the Tribe or held by the United States in trust for the Tribe . . ." and "land owned in fee by non-members of the Tribe. . . ." 450 U.S. at 557. See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), wherein this Court held that:

Our decision in *Montana v. United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree[d]' that a Tribe may

¹ *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* rule is set out in the Petition at 9.

'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'

462 U.S. at 330-331 (emphasis in original; citations and footnote omitted).

2. *Pease* shows that the *Montana* rule cannot be extended to lands other than non-Indian fee lands without conflicting with the *Iowa Mutual* rule.² As does the *en banc* majority in the present case, *A-1 Contractors v. Strate*, the court in *Pease* merely forces a reconciliation by subsuming the *Iowa Mutual* rule into the *Montana* rule. *Pease*, 1996 WL 512363, at *6-7.

3. *Pease* misconstrues *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 485 (1994) (*Hinshaw*), a case cited by Petitioners as being in conflict with the *en banc* majority in *A-1 Contractors v. Strate*.³ *Hinshaw* upheld tribal court jurisdiction over a tort case arising on a reservation and brought by a tribal member against a non-Indian. 42 F.3d at 1180-81. In straining to avoid any conflict between *Hinshaw* and *Montana*, the court in *Pease* interprets *Hinshaw* as "implicitly" having been decided under the *Montana* rule. *Pease*, 1996 WL 512363, at *7. As we have pointed out, however, *Hinshaw* "applied the *Iowa Mutual* rule, not the *Montana* rule." Petition at 14, *Hinshaw* therefore is in conflict with the *en banc* majority in *A-1 Contractors v. Strate* regarding the issue of which rule governs tort cases arising on Indian land.

² *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The *Iowa Mutual* rule is set out in the Petition at 8.

³ See Petition at 13-15.

4. *Pease* supports Petitioners' alternative argument that reservation contacts, such as those that A-1 Contractors had when it allegedly committed a tort on the Reservation here, are sufficient to sustain tribal court jurisdiction under the *Montana* "tribal interest test."⁴ The court in *Pease* interprets *Hinshaw* as holding that a tribe's exercise of sovereign authority "coupled with the tortfeasor's specific contacts with the reservation . . . [create] the requisite 'tribal interest' under *Montana*." *Pease*, 1996 WL 512363, at *7. Assuming *arguendo* that this interpretation of *Hinshaw* is correct, then *Hinshaw* is in conflict with the holding of the *en banc* majority in *A-1 Contractors v. Strate* on this point. See also *Williams v. Lee*, 358 U.S. 217 (1959) (upholding tribal court jurisdiction over a contract action brought by a non-Indian who dealt with a tribal member on a reservation).

Respectfully submitted,

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September 23, 1996

⁴ The *Montana* "tribal interest test" is set out in the Petition at 15-20.

In The
Supreme Court of the United States

October Term, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL
JUDGE OF THE TRIBAL COURT OF THE THREE AFFILIATED
TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION;
THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES
OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON
BENEDICT FREDERICKS; KENNETH LEE FREDERICKS;
PAUL JONAS FREDERICKS; HANS CHRISTIAN
FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

v.

Petitioners,

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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**Petition For Certiorari Filed May 16, 1996
Certiorari Granted October 1, 1996**

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JOINT APPENDIX

Page

Table of Contents

1. Notation as to items not printed in Joint Appendix.....	1
2. Chronological List of Relevant Docket Entries and Dates.....	2
3. Complaint Filed in Tribal Court (May 9, 1991)	5
4. Defendant Stockert's Notice of Objection to Jurisdiction Filed in Tribal Court (June 5, 1991)	11
5. Defendant Stockert's Motion to Dismiss Filed in Tribal Court (June 14, 1991)	13
6. Defendant A-1 Contractors' Notice of Objection to Jurisdiction Filed in Tribal Court (June 19, 1991).....	15
7. Defendant A-1 Contractors' Joinder in Stockert's Motion to Dismiss Filed in Tribal Court (June 19, 1991).....	17
8. Memorandum Opinion of the Tribal Court (Sept. 4, 1991)	19
9. Opinion of the Tribal Court of Appeals (Jan. 8, 1992).....	26
10. Stipulation of Dismissal of Defendant Continental Western Insurance Company Filed in Tribal Court (Feb. 3, 1992)	38
11. Order of the Tribal Court Dismissing Continental Western Insurance Company (Feb. 4, 1992)	40
12. Complaint Filed in the U.S. District Court (Feb. 5, 1992)	41

JOINT APPENDIX - Continued

	Page
13. Tribal Defendants' Amended Answer Filed in U.S. District Court (Apr. 6, 1992).....	46
14. Memorandum, Order & Judgment of the U.S. District Court (Sept. 16, 1992).....	54
15. Majority & Dissenting Opinions of the Panel of the U.S. Court of Appeals for the Eighth Circuit (Nov. 29, 1994).....	68
16. Majority & Dissenting Opinions of the <i>En Banc</i> U.S. Court of Appeals for the Eighth Circuit (Feb. 16, 1996).....	91

Notation as to Items Not Printed in Joint Appendix

The following Order has been omitted in the printing of this Joint Appendix because it appears on the following page in the Appendix to the Petition for *Certiorari*:

Order of the U.S. Court of Appeals for the Eighth Circuit Granting Rehearing *En Banc*A49

**Chronological List of Relevant
Docket Entries and Dates**

May 9, 1991	Summons & Complaint, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
June 5, 1991	Defendant Stockert's Notice of Objection to Jurisdiction, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
June 14, 1991	Defendant Stockert's Motion to Dismiss and Supporting Brief, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
June 19, 1991	Defendant A-1 Contractors' Notice of Objection to Jurisdiction, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
June 19, 1991	Defendant A-1 Contractors' Joinder in Stockert's Motion to Dismiss, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
September 4, 1991	Memorandum Opinion of the Tribal Court, Mandaree, North Dakota
December 13, 1991	Oral Argument before Three-Judge Panel, Northern Plains Intertribal Court of Appeals, Aberdeen, South Dakota
January 8, 1992	Opinion of the Northern Plains Intertribal Court of Appeals, Aberdeen, South Dakota

February 3, 1992	Stipulation of Dismissal of Defendant Continental Western Insurance Company, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
February 4, 1992	Order of Dismissal re: Defendant Continental Western Insurance Company, Tribal Court of the Three Affiliated Tribes, Mandaree, North Dakota
February 5, 1992	Summons & Complaint, United States District Court for the District of North Dakota, Southwestern Division, Bismarck, North Dakota
April 6, 1992	Tribal Defendants' Amended Answer, United States District Court for the District of North Dakota, Southwestern Division, Bismarck, North Dakota
September 16, 1992	Memorandum, Order and Judgment of the United States District Court, Southwestern Division (Conmy, J.), Bismarck, North Dakota
June 16, 1993	Oral Argument before Three-Judge Panel, United States Court of Appeals for the Eighth Circuit, St. Paul, Minnesota
November 29, 1994	Majority and Dissenting Opinions of the Panel of the United States Court of Appeals for the Eighth Circuit, St. Paul, Minnesota

May 23, 1995 Oral Argument on Rehearing *En Banc*, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri

February 16, 1996 Majority and Dissenting Opinions of the *En Banc* United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri

May 16, 1996 Petition for a Writ of *Certiorari* (Docket No. 95-1872) to the United States Supreme Court

October 1, 1996 Order of the United States Supreme Court granting Petitioners' Petition for a Writ of *Certiorari*

THREE AFFILIATED TRIBES IN TRIBAL COURT
 FORT BERTHOLD RESERVATION
 MANDAREE, NORTH DAKOTA
 CIVIL NO. _____

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul)	
Jonas Fredericks, Hans Christian	)	COMPLAINT
Fredericks, Jeb Pius Fredericks,	)	(Filed
Kenneth Lee Fredericks on behalf	)	5-14-91)
of Gisela Fredericks; and Gisela)	
Fredericks,)	
)	
Plaintiffs,)	
)	
v.)	
)	
Continental Western Insurance)	
Company, A-1 Contractors, Lyle)	
Stockert,)	
)	
Defendants.)	

THE FORT BERTHOLD TRIBAL COURT TO THE
 ABOVE NAMED DEFENDANT

Plaintiffs for their Complaint state:

PARTIES

1.

Plaintiff Lyndon Benedict Fredericks is an enrolled member of the Three Affiliated Tribes and is the adult son of Gisela Fredericks.

6

2.

Plaintiff Kenneth Lee Fredericks is an enrolled member of the Three Affiliated Tribes and is the adult son of Gisela Fredericks.

3.

Paul Jonas Fredericks is an enrolled member of the Three Affiliated Tribes and is the adult son of Gisela Fredericks.

4.

Hans Christian Fredericks is an enrolled member of the Three Affiliated Tribes and is the adult son of Gisela Fredericks.

5.

Jeb Pius Fredericks is an enrolled member of the Three Affiliated Tribes and is the adult son of Gisela Fredericks.

6.

Plaintiff Kenneth Lee Fredericks is the conservator for Gisela Fredericks. The conservatorship was established in Tribal Court on the Fort Berthold Reservation.

7.

Gisela Fredericks is the surviving spouse of Ken Fredericks, Sr. an enrolled member of the Three Affiliated Tribes.

8.

Continental Western Insurance Company is an Insurance Company organized in the State of Delaware and has its principal place of business in Iowa.

7

9.

A-1 Contractors is a construction company from Dickinson, North Dakota.

10.

Lyle Stockert is the owner of A-1 Contractors and Continental Western Insurance Company provides insurance to A-1 Contractors and Lyle Stockert.

FACTUAL BACKGROUND

11.

Prior to November 1990, A-1 Contractors had entered into a contract with the Three Affiliated Tribes.

12.

A-1 Contractors contracted to perform construction work on the Fort Berthold Indian Reservation.

13.

On November 09, 1990, A-1 Contractors were engaged in construction work on the Fort Berthold Reservation.

14.

A-1 Contractors had a gravel truck that was hauling gravel within the Fort Berthold Reservation.

15.

The A-1 Contractor's truck was negligently maintained and operated.

16.

On November 9, 1990, A-1 Contractors negligently operated this truck which caused an automobile accident with Gisela Fredericks on the Fort Berthold Reservation.

As a result of A-1 Contractor's negligence, The Plaintiffs have been seriously and permanently injured.

CLAIM I.

LOSS OF CONSORTIUM

Plaintiffs for their first claim state:

Plaintiffs Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jones Fredericks, Hans Christian Fredericks, and Jeb Pius Fredericks are all the surviving adult children of Gisela Fredericks.

17.

As a result of the negligence of the defendants, the children have been deprived of the love, support, companionship, and company of their mother.

CLAIM II.

PERSONAL INJURY

Gisela Fredericks for the second claim states:

18.

A-1 contractors and/or Lyle Stockert negligently operated and maintained their truck within the exterior boundaries of the Fort Berthold Indian Reservation.

19.

As a result of A-1 Contractor's and Lyle Stockert's negligence, Gisela Fredericks was seriously and permanently injured and incurred medical expenses in excess of \$32,000.00.

CLAIM III.

BAD FAITH

Plaintiffs for their third claim for relief states:

20.

Continental Western Insurance Company has a duty to deal with the Plaintiff's [sic] in good faith.

21.

Continental Western has breached its duty of good faith and caused serious and permanent injury to the Plaintiff's.

22.

As a result of A-1 Contractor's and Lyle Stockert's negligence, Gisela Fredericks was seriously and permanently injured and incurred medical expenses in excess of \$32,000.00.

WHEREFORE, Plaintiffs pray for the following relief.

- (1) Plaintiffs, Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jones Fredericks, Hans Christian Fredericks, and Jeb Pius Fredericks request damages for loss of consortium in excess of One Million Dollars (\$1,000,000.00).

- (2) Plaintiff Gisela Fredericks requests damages excess of One Million Dollars (\$1,000,000.00).
- (3) All the Plaintiffs jointly request compensation damages for breach of the covenant of good faith and fair dealing in excess of one million dollars (\$1,000,000.00)
- (4) Punitive damages if allowed by Tribal Law in excess of ten million dollars (\$10,000,000.00).

JURY DEMAND

Plaintiffs hereby request a trial by Jury.

Dated this 9 day of May, 1991.

/s/ T. Dickson
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 NODLAND, THARALDSON
 & DICKSON
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 58502

(Certificate of Service omitted in printing)

THREE AFFILIATED TRIBES IN TRIBAL COURT
 FORT BERTHOLD RESERVATION
 MANDAREE, NORTH DAKOTA
 CIVIL No. 5-91-A40-150

Lyndon Benedict Fredericks,)
 Kenneth Lee Fredericks, Paul)
 Jonas Fredericks, Hans Christian)
 Fredericks, Jeb Pius Fredericks,)
 Kenneth Lee Fredericks on behalf)
 of Gisela Fredericks; and Gisela)
 Fredericks,)

Plaintiffs,)

v.)

Continental Western Insurance)
 Company, A-1 Contractors, Lyle)
 Stockert,)

Defendants.)

NOTICE OF OBJECTION TO JURISDICTION

(Filed
 6-6-91)

Defendant Lyle Stockert has previously made a special appearance and amended special appearance with the court. Defendant Lyle Stockert hereby objects to the Tribal Court's jurisdiction over the subject matter of this litigation and the court's personal jurisdiction over him. An appropriate motion to dismiss for lack of jurisdiction will be filed by Stockert who reserves all defenses available.

Dated this 5th day of June, 1991.

ZUGER, KIRMIS, BOLINSKE &
SMITH

Attorneys for Defendant

Lyle Stockert

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BY: /s/ Michael G. Fiergola
Michael G. Fiergola

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THREE AFFILIATED TRIBES IN TRIBAL COURT
FORT BERTHOLD RESERVATION

MANDAREE, NORTH DAKOTA

CIVIL No. 5-91-A40-150

Lyndon Benedict Fredericks,)
Kenneth Lee Fredericks, Paul)
Jonas Fredericks, Hans Christian)
Fredericks, Jeb Pius Fredericks,)
Kenneth Lee Fredericks on behalf)
of Gisela Fredericks; and Gisela)
Fredericks,)

Plaintiffs,)

vs.)

Continental Western Insurance)
Company, A-1 Contractors, Lyle)
Stockert,)

Defendants.)

**MOTION TO
DISMISS
ACTION
AGAINST
DEFENDANT
LYLE
STOCKERT**

Defendant Lyle Stockert moves the Fort Berthold Tribal Court to dismiss this action against him on the grounds that the court has neither personal jurisdiction over him nor jurisdiction over the subject matter of this litigation.

This motion is made upon all of the pleadings and the supporting memorandum which have been filed with the court.

Dated this 19th day of June, 1991.

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SMITH

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BY: /s/ Michael G. Fiergola
Michael G. Fiergola
Patrick J. Ward

(Certificate of Service omitted in printing)

THREE AFFILIATED TRIBES IN TRIBAL COURT
FORT BERTHOLD RESERVATION

MANDAREE, NORTH DAKOTA

CIVIL No. 5-91-A40-150

Lyndon Benedict Fredericks,)
Kenneth Lee Fredericks, Paul)
Jonas Fredericks, Hans Christian)
Fredericks, Jeb Pius Fredericks,)
Kenneth Lee Fredericks on behalf)
of Gisela Fredericks; and Gisela)
Fredericks,)

Plaintiffs,)

vs.)

Continental Western Insurance)
Company, A-1 Contractors, Lyle)
Stockert,)

Defendants.)

**NOTICE OF
OBJECTION TO
JURISDICTION**

Defendant A-1 Contractors has made a special appearance with the court. Defendant A-1 Contractors hereby objects to the Tribal Court's jurisdiction over the subject matter of this litigation and the court's personal jurisdiction over it. An appropriate motion to dismiss for lack of jurisdiction will be filed by A-1 Contractors who reserves all defenses available.

Dated this 19th day of June, 1991.

ZUGER, KIRMIS, BOLINSKE &
SMITH

Attorneys for Defendant

A-1 Contractors

P.O. Box 1695

Bismarck, ND 58502-1695

BY: /s/ Michael G. Fiergola
Michael G. Fiergola

(Certificate of Service omitted in printing)

THREE AFFILIATED TRIBES IN TRIBAL COURT
FORT BERTHOLD RESERVATION

MANDAREE, NORTH DAKOTA

CIVIL NO. 5-91-A40-150

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul)	
Jonas Fredericks, Hans Christian)	
Fredericks, Jeb Pius Fredericks,)	
Kenneth Lee Fredericks on behalf)	
of Gisela Fredericks; and Gisela)	
Fredericks,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
Continental Western Insurance)	
Company, A-1 Contractors, Lyle)	
Stockert,)	
)	
Defendants.)	

**JOINDER OF
DEFENDANT
A-1
CONTRACTORS
IN LYLE
STOCKERT'S
MOTION TO
DISMISS**

Defendant A-1 Contractors hereby joins in the motion of the defendant Lyle Stockert dated June 14, 1991 which moves the Fort Berthold Tribal Court to dismiss this action against him on the grounds that the court has neither personal jurisdiction over him nor jurisdiction over the subject matter of this litigation.

Defendant A-1 Contractors further joins in Lyle Stockert's memorandum in support of motion to dismiss action against defendant Lyle Stockert dated June 14, 1991. By virtue of A-1 Contractors' joinder in the motion to dismiss, it will not file a separate memorandum in support of the motion.

Dated this 19th day of June, 1991.

ZUGER, KIRMIS, BOLINSKE &
SMITH

Attorneys for Defendant

A-1 Contractors

P.O. Box 1695

Bismarck, ND 58502-1695

BY: /s/ Michael G. Fiergola
Michael G. Fiergola

(Certificate of Service omitted in printing)

IN TRIBAL COURT FORT BERTHOLD RESERVATION

THREE AFFILIATED TRIBES

MANDAREE,
NORTH DAKOTA

Lyndon Benedict Fredericks,
Kenneth Lee Fredericks, Paul
Jonas Fredericks, Hans Christian
Fredericks, Jeb Pius Fredericks,
Kenneth Lee Fredericks on
behalf of Gisela Fredericks; and
Gisela Fredericks,

Plaintiff,

vs.

Continental Western Insurance
Company, A-1 Contractors, Lyle
Stockert,

Defendant.

MEMORANDUM
OPINION

CIVIL NO:

5-91-A04-150

(Filed
Sep. 5, 1991)

This matter having come before the Court upon Defendants', A-1 Contractors and Lyle Stockert, Motion to Dismiss based upon a lack of personal and subject matter jurisdiction. The Motion to Dismiss was initially brought by the Defendant Lyle Stockert and was joined in by A-1 Contractors. The Defendant Continental Western Insurance Company has also joined in the Motion to Dismiss.

The Defendants filed a Memorandum in Support of Motion to Dismiss dated June 14, 1991. The Motion to

Dismiss was resisted by the Plaintiffs with their filing of a Brief in Opposition to the Motion to Dismiss dated July 22, 1991. The Defendants then filed a Reply Memorandum in Support of Motion to Dismiss dated August 1, 1991.

The Court, having considered the parties arguments on the Motion to Dismiss and being fully advised in the premises, now issues the following Memorandum Opinion:

Initially, the Court is faced with a somewhat bare record of the facts of this case. None of the parties have submitted affidavits in support of or opposition to the pending Motion. Accordingly, the Court must rely upon the Briefs and Memorandums filed by the parties as well as the pleadings on file with the Court to discern the factual background of this case. From such a review, the Court finds that the following facts are undisputed by the parties for the purpose of this motion:

1. On November 9, 1990, an automobile accident occurred North of Twin Buttes, North Dakota, within the boundaries of the Fort Berthold Reservation, involving vehicles driven by the Plaintiff Gisela Fredericks and the Defendant Lyle Stockert.
2. That neither Lyle Stockert nor Gisela Fredericks are enrolled members of the Three Affiliated Tribes.
3. That the remaining Plaintiffs are the adult children of Gisela Fredericks and are apparently enrolled members of the Three Affiliated Tribes.
4. That at the time the automobile accident occurred, Gisela Fredericks was a resident of the Fort

Berthold Reservation and Lyle Stocker was employed by and/or the owner or operator of A-1 Contractors which at that time was performing work under a sub-contract on a construction project within the boundaries of the Fort Berthold Reservation. The Court assumes, for the purpose of this motion, that the Defendant Continental Western Insurance Company apparently provided coverage for the Defendants' activities within the Reservation boundaries.

As this case is currently postured, the Plaintiff Gisela Fredericks, a nonmember of the Three Affiliated Tribes, has consented to the jurisdiction of the Tribal Court by filing this action in the Tribal Court and seeking to prosecute her claims within the Tribal Court system. However, the Defendants have all filed special appearances resisting the jurisdiction of this Court.

In considering the present Motion, the Court is guided by the following provisions of the Tribal Code:

CHAPTER 1, SECTION 3: JURISDICTION OF THE COURTS

SUB-SECTION 3.1 - POLICY

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

SUB-SECTION 3.2 - JURISDICTION-TERRITORIAL

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee

patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

SUB-SECTION 3.3 - JURISDICTION-PERSONAL

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who *reside, enter, or transact business within the territorial boundaries of the Reservation*; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law. (Definition omitted)

SUB-SECTION 3.5 - JURISDICTION-SUBJECT MATTER

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation*, and over all criminal offenses which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

CHAPTER 2, SECTION 3 (f): LONG ARM STATUTE. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- (1) The transaction of any business of the Reservation;
- (2) The commission of any act which results in accrual of a tort action within the Reservation;
- (3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

(emphasis added)

Applying these code sections to the undisputed facts of this case, it is clear that the Court has jurisdiction over the Plaintiff Gisela Fredericks. As a resident of the Fort Berthold Reservation, she is entitled to avail herself of the Tribal Court system to prosecute any claims which may arise within the Reservation boundaries. The claims of the remaining Plaintiffs, as enrolled members, are also within the jurisdiction of the Tribal Court.

Similarly, it is clear that the Defendants are also subject to the jurisdiction of this Court. The Defendants have entered upon and transacted business within the territorial boundaries of the Reservation. As such, they have entered into consensual relationships with the Tribe and its members. The automobile accident occurred within the Reservation boundaries while the Defendant was engaged in the conduct of business on the Reservation.

The Defendants cite the case of *Montana vs. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981) as authority for the dismissal of this action. However, that case is distinguishable from the present case as it involved what was essentially criminal sanctions imposed upon nonmembers for violation of Tribal hunting and fishing codes. In addition, the facts in *Montana* dealt with activity on State-owned land within the Reservation, a fact situation not present in the instant case.

The Court in *Montana* specifically recognized that Indian Tribes retain civil authority over the conduct of non-Indians within the Reservation. The commission of a tort, as alleged in the Complaint, certainly is an act which has a direct effect on the economic security, health and

welfare of the Tribes and its members. See *Montana* at 450 U.S. 565, 566. Further, as the tort alleged in the Complaint arises out of the Defendant's consensual business activity within the Reservation. The Court's ruling in *Montana* does not bar the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs. In fact, the claim presented by the Plaintiffs appear to be precisely the type of civil actions the *Montana* Court recognizes as being subject to Tribal jurisdiction.

In any event, since the entry of the *Montana* decision, the Supreme Court has continued to recognize and affirm the exercise of civil jurisdiction by Tribal Courts over the activity of non-Indians on Reservation land as an important aspect of Tribal sovereignty and it has held that such jurisdiction over these consensual activities directly affecting the welfare of the Tribes, its members and Reservation residents presumptively lie with the Tribal Courts unless affirmatively limited by specific treaty provisions or federal statutes. See, generally, *Dura vs. Reina*, 110 S.Ct. 2053 (1990); *Iowa Mutual Insurance Company vs. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987); *Nat. Farmers Union Ins. Co. vs. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985).

Accordingly, the Court finds that the Tribal Court has jurisdiction over the Plaintiff Gisela Fredericks based upon her status as a resident of the Reservation and over the Defendants due to their voluntary and consensual acts of entering upon and transacting business within the boundaries of the Fort Berthold Reservation. The Court finds that these activities are not "de minimus" and the assertion of Tribal Court jurisdiction does not offend traditional concepts of due process so as to render the

exercise of jurisdiction by this Court violative of the due process provisions of the United States Constitution. The Defendants have failed to identify any federal laws, treaty provisions or provisions of the United States Constitution which would preclude the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs.

As the Court determines that it has jurisdiction over the non-Tribal member parties, specifically, Plaintiff Gisela Fredericks and Defendants Lyle Stockert, A-1 Contractors, and Continental Western Insurance Company, the Court does not address nor express any opinion concerning the consortium claims brought by the adult children of the Plaintiff Gisela Fredericks. The status of Gisela Fredericks as a resident of the Fort Berthold Reservation and the consensual relationships established by the Defendants by entering upon and transacting business within the Reservation boundaries together with the alleged tort occurring within the Reservation are sufficient to establish the jurisdiction of this Court.

Accordingly, the Motion to Dismiss is DENIED.

Dated this 4th day of September, 1991.

BY THE COURT:

/s/ William L. Strate
Associate Tribal Judge

**IN THE
NORTHERN PLAINS INTERTRIBAL
COURT OF APPEALS**

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul Jonas)	
Fredericks, Hans Christian)	
Fredericks, Jeb Pius Fredericks,	)	No. CV-06-06-91
Kenneth Lee Fredericks on behalf)	
of Gisela Fredericks; and Gisela)	
Fredericks,)	
)	
Plaintiffs-Appellees,	)	OPINION
vs)	
)	
Continental Western Insurance	)	(Dated
Company, A-1 Contractors, Lyle	)	January 8, 1992)
Stockert,)	
)	
Defendants-Appellants.)	

Appeal From Tribal Court
For The Three Affiliated Tribes
Of The Fort Berthold Indian Reservation

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Argued by: Michael G.
Fiergola and Mitchell
Mahoney

Argued by: Ronald A.
Reichert

Statement of the Case

This personal injury lawsuit was commenced in the Fort Berthold Tribal Court as a result of an automobile accident which occurred on the Fort Berthold Indian Reservation, North Dakota on November 9, 1990.

The fundamental issue before this Court is whether the Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action. The parties involved in the accident are non-Indian.

It is the view of this Court that the Fort Berthold Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action, accordingly the trial court's decision is affirmed.

The appellees Motion to Dismiss the appeal is denied as the appeal was timely and the issue of jurisdiction is appealable.

The other issues concerning loss of consortium by adult children and the naming of the insurance company in a tort action are remanded back to the Trial Court for its consideration.

Facts

On November 9, 1990, Gisela Fredericks driving a Honda Civic collided with a gravel truck driven by Lyle Stockert on North Dakota Highway No. 8 north of Twin Buttes, North Dakota. The collision occurred within the exterior boundaries of the Fort Berthold Indian Reservation.

Gisela Fredericks has been a resident of the Fort Berthold Indian Reservation for over 40 years. Mrs. Fredericks is not a member of Three Affiliated Tribes. Her now deceased husband, Kenneth Fredericks Sr. was a life long farmer-rancher on the Fort Berthold Reservation and a member of Three Affiliated Tribes. Mrs. Frederick's five sons and plaintiffs in this action are members of the tribe. Mrs. Fredericks owns real and personal property on the Fort Berthold Indian Reservation.

The gravel truck that was involved in the collision was owned by A-1 Contractors and driven by Lyle Stockert. The truck was insured by Continental Western Insurance Company. At the time of the accident A-1 contractors was hauling gravel on the reservation under a sub-contract agreement with LCM Corporation. LCM Corporation is owned by Three Affiliated Tribes Tribal Government.

Analysis of Law and Fact

To give proper perspective in analyzing the issue of whether the Fort Berthold Tribal Court has jurisdiction over non-Indians involved in a traffic accident on the reservation it is appropriate to give a brief overview of

federal case law regarding civil and criminal jurisdiction of tribal courts.

In *Oliphant v Suquamish Indian Tribes*, 435 U.S. 191 (1978) the Supreme Court held that tribes cannot exercise criminal jurisdiction over non-Indians. The Court reasoned that the exercise of such jurisdiction would be inconsistent with the status of tribes as domestic dependent nations. In *Duro v Reina* 110 S. Ct. 2053 (1990) the Supreme Court has ruled that tribal courts do not have criminal jurisdiction over non-member Indians; also see *Greywater v Joshua* 846 F 2d 486 (8th Circuit 1988). Since *Duro*, Congress and the President have passed a law giving tribal courts criminal jurisdiction over non-member Indians, whether such law passes constitutional muster is questionable; see *Duro and Reid v Covert* 354 U.S. 1 (1957).

In civil actions tribes have sovereign immunity. *Three Affiliated Tribes v Wold Eng'g* 476 U.S. 877 (1986), *Wichita Affiliated Tribes of Oklahoma v Hodel* 788 F 2d 765 (D.C. Circuit 1986).

Regarding personal jurisdiction, state courts do not have jurisdiction over an action arising in Indian Country filed by a non-Indian against an Indian, because state court jurisdiction would interfere with the rights of reservation Indians to make their own laws and be ruled by them *Williams v Lee* 358 U.S. 217 (1959). State courts do not have jurisdiction to hear claims arising in Indian Country when both parties are Indian and civil jurisdiction hasn't been transferred to the state by public law 280 67 Stat. sub. 588 codified as amended 18 U.S.C. sub. 1162 *Fisher v District Court* 424 U.S. 382 (1976). Absent Federal

statutory authority, *Williams* has deprived state courts of civil jurisdiction over Indians in Indian Country. State courts do have civil jurisdiction over actions where an Indian files against a non-Indian even when the cause of action arises in Indian Country *Three Affiliated Tribes v Wold* 476 U.S. 877 (1986). State courts have jurisdiction over suits by non-Indians against non-Indians even when the claim arises in Indian Country, but only if Indian interests are not affected *Williams v Lee* 358 U.S. 217 (1959).

In the area of regulation, tribal governments are limited in their authority over the activities of non-Indians on fee title land on reservations but not totally divested of such authority; *Montana v United States* 450 U.S. 544, *Brendale v Confederated Tribes & Bands* 109 S. Ct. 2994 (1989). "Survey of Civil Jurisdiction in Indian Country 1990" 2 *American Indian Law Review* Fall 1991 gives an excellent overview of Indian civil jurisdiction.

"In general terms jurisdiction is the power to hear and determine a cause of action." *Schillerstrom v Schillerstrom* 32 NW 2d 106, 122 (1948). The concept of jurisdiction is divided into two types: jurisdiction over the subject matter and jurisdiction over the parties. See generally 20 Am. Jur. 2d courts subsection 105 (1965). To properly act in a case, a court must be vested with both jurisdictions *Reliable Inc. v Stutsman County Commission* 409 NW2d 632, 634 (N.D. 1987). "A court has subject matter jurisdiction if it has authority under the constitution and laws, to hear and determine cases of a general class to which a particular action belongs."

The appellants in this action, Continental Western Insurance, A-1 Contractors and Lyle Stockert contend that the Tribal Court does not have jurisdiction over the parties because Gisela Fredericks and Lyle Stockert are non-Indian. Further extending their legal theory, A-1 is not an Indian nor Tribal Corporation.

Supporting their proposition that the Tribal Court does not have jurisdiction over this tort action the parties cite *Montana v United States* 450 U.S. 544. They also cite *Brendale v Confederated Tribes & Bands* 492 U.S. 408. *Montana* states that tribes do not have the authority to regulate hunting and fishing by non-Indians on non-Indian lands. Through their original incorporation into the United States as well as through specific treaties and statutes Indian tribes have lost many of the attributes of sovereignty particularly as it relates to the relations between the tribe and non-members of the tribe. In *Brendale* tribes are limited in zoning fee title lands within a reservation. However, under certain circumstances tribes may place zoning restrictions on fee title property of non-Indians.

It is the opinion of this Court that *Montana* and *Brendale* are not dispositive of the issue before this Court. The regulation of non-Indians and their property with civil, quasi-criminal or criminal penalties is quite different than non-Indians seeking damages in a tort action in Tribal Court. The analysis of determining criminal jurisdiction over non-Indians is not controlling nor the same as the analysis of determining civil jurisdiction *National Farmers Union* 85 L.Ed.2d at 826 footnote 16 & 17.

It is the opinion of this Court that *Williams v Lee* 358 U.S. 217 (1959) along with *Iowa Mutual Insurance Co. v La Plante* 480 U.S. 9 (1987) are controlling in resolving the issue before this Court. In *Williams* the Supreme Court recognized the authority of the Tribal Court to hear disputes between an Indian plaintiff and a non-Indian defendant. The Court stated in *Williams*: "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the defendant is not an Indian. He was on the reservation and the transaction with an Indian took place there." Affirming the reasoning in *Williams* over 25 years later *La Plante* stated that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and civil jurisdiction over such activities presumptively lies in tribal courts unless affirmatively limited by specific treaty provision or federal statute *Iowa Mutual Insurance Co. v LaPlante* 94 L.Ed. 2d 10 at 21.

Although Gisela Fredericks is not a citizen of Three Affiliated Tribes she has been a member of the Fort Berthold community and a resident for many years. Like any sovereign, Three Affiliated Tribes has an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction. Absent Congressional directive this Court can find no compelling reason not to give the Fort Berthold Tribal Court jurisdiction.

Amalgamating Federal case law with regard to tribal civil jurisdiction it is the view of this Court that there is a two pronged inquiry in determining whether a tribal court has jurisdiction. The first prong of inquiry is whether a tribal court is authorized by the governing authority to take jurisdiction. The second prong of inquiry is whether a tribal court is limited in taking jurisdiction by either treaty provision or federal law.

In analyzing the first prong of the inquiry it is necessary to determine what authority was conveyed by Three Affiliated Tribes Tribal Council to Tribal Court. Relevant sections of the Tribal Code are listed.

Chapter 1, Section 3: Jurisdiction of the Courts

Sub-Section 3.1 - Policy

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

Sub-Section 3.2 - Jurisdiction-Territorial

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and overland outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Sub-Section 3.3 - Jurisdiction-Personal

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the court shall have civil and criminal jurisdiction over all persons who *reside*,

enter, or transact business within the territorial boundaries of the Reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Sub-Section 3.5 - Jurisdiction-Subject Matter

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation*, and over all criminal offenses which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2, Section 3 (f): Long Arm Statute [sic].

Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- (1) The transaction of any business of the Reservation;
- (2) The commission of any act which results in accrual of a tort action within the Reservation;
- (3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation, (emphasis added)

It is clear that the Tribal Council gave Tribal Court broad authority to hear civil disputes and did not limit the Court to particular types of actions or persons. There is no limitation in the code excluding non-Indians from seeking relief in a tort action against another non-Indian.

Unlike *Montana* and *Brendale* where an individuals rights and or privileges were being diminished by the tribal governing authority, here they are being expanded. In this case the tribal governing body has extended the

civil justice system to all who are on the Fort Berthold Reservation so that they have the right to seek redress in a court of law when they are not satisfied by offers of settlement or when a party denies liability.

In the second prong of the analysis this Court can find no treaty restrictions or federal statutes prohibiting the tribal court from taking jurisdiction over this case. The tribal court may be limited by the Indian Civil Rights Act, 25 U.S.C. sub.1302; on how it may proceed but it does not create a prohibition on the tribal court in taking jurisdiction; nor has the State of North Dakota taken jurisdiction of this case through Public Law 280; 25 U.S.C. sub. 1321.

It is noted that the parties in this action are all represented by licensed attorneys and the trial judge in this case is a licensed practicing attorney and although the State of North Dakota may have jurisdiction in this matter it is not exclusive. The State is probably prohibited from taking jurisdiction of this matter while this action is pending in *Tribal Court National Farmers Union Insurance Co. v Crow Tribe* 471 U.S. 845.

The Tribal Court is subject to the limitation of minimum contacts in taking jurisdiction *World-Wide Volkswagen Corp. v Woodson* 444 U.S. 286 (1980) *International Shoe Co. v Washington* 326 U.S. 310 (1945). Minimum contacts is not a concern since the automobile accident took place within the boundaries of the reservation. The plaintiff is a resident of the reservation and the defendant Stockert was doing business on the reservation and Continental is Stockert's insurance carrier. The fact that the auto/truck collision occurred on a state highway does not

in and of itself divest the tribal court of jurisdiction
National Farmers Union Co. v Crow Tribe at 847.

For the reasons set out in this Opinion the decision of the Trial Court is affirmed. The Fort Berthold Tribal Court has jurisdiction over the parties and subject matter in this case.

Other Issues

This Court expresses no opinion as to whether the plaintiffs have a claim for loss of consortium; nor does this Court express an Opinion as to whether Continental Western Insurance should be a named defendant in this tort action. These issues have not been addressed by the Trial Court and it is untimely for this Court to render an Opinion on these issues. Those issues are remanded back to the Trial Court for its consideration.

The Appellees Motion to Dismiss Appeal

The Appellees Motion to Dismiss the Appeal is denied. It is the Opinion of this Court that the issue of jurisdiction is appealable. The Memorandum Opinion of the Trial Court was an Order. Based on the filing date the appellants complied with Appellate Rule 20.

The Trial Court's jurisdiction determination is affirmed. This matter is remanded back to the Trial Court for further proceedings.

Dated this 8th day of January, 1992.

OPINION BY:

1-13-92 /s/ Donovan Foughty
Donovan Foughty
Appellate Judge

/s/ Paul Godtland
Paul Godtland
Chief Appellate Judge

/s/ Robert GreyEagle
Robert GreyEagle
Appellate Judge

Lyndon Benedict Fredericks,)
Kenneth Lee Fredericks, Paul)
Jonas Fredericks, Hans Christian) CIVIL NO.
Fredericks, Jeb Pius Fredericks,) 5-91-A40-150
Kenneth Lee Fredericks on behalf)
of Gisela Fredericks,)
Plaintiffs,)
v.)
Continental Western Insurance)
Company, A-1 Contractors, Lyle)
Stockert,)
Defendants.)

Dated this 3 day of February, 1992

By /s/ T. Dickson
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By /s/ M. Mahoney
Mitchell Mahoney
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Company
P.O. Box 1000
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(Certificate of Service omitted in printing)

THREE AFFILIATED TRIBES IN TRIBAL COURT
FORT BERTHOLD RESERVATION
MANDAREE, NORTH DAKOTA

Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul)	
Jonas Fredericks, Hans Christian	)	CIVIL NO.
Fredericks, Jeb Pius Fredericks,	)	5-91-A40-150
Kenneth Lee Fredericks on behalf	)	ORDER OF
of Gisela Fredericks,	)	DISMISSAL
)	
Plaintiffs,	)	(Filed
	)	2-5-92)
v.)	
)	
Continental Western Insurance)	
Company, A-1 Contractors, Lyle)	
Stockert,)	
)	
Defendants.)	
)	

Pursuant to the attached Stipulation,

IT IS ORDERED that the Plaintiff's Complaint against Continental Western Insurance Company is dismissed without prejudice and Continental Western Insurance Company is dismissed as a party defendant.

Dated this 4th day of February, 1992.

BY THE COURT

/s/ William L. Strate
The Honorable
William L. Strate
Judge of the Tribal Court

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A-1 Contractors and Lyle Stockert,)	
)	
Plaintiffs,	)	CIVIL CASE NO.
	)	A1-92-024
-vs-)	
	)	COMPLAINT
Honorable William D. Strate,	)	(Filed
Associate Tribal Judge of the Tribal	)	Feb. 5, 1992)
Court of the Three Affiliated)	
Tribes of the Fort Berthold Indian)	
Reservation, The Tribal Court of)	
the Three Affiliated Tribes of the)	
Fort Berthold Indian Reservation,)	
Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul Jonas)	
Fredericks, Hans Christian)	
Fredericks, Jeb Pius Fredericks,)	
Kenneth Lee Fredericks on behalf)	
of Gisela Fredericks, and Gisela)	
Fredericks.)	
)	
Defendants.)	

I. INTRODUCTION

1. This is an appeal of a decision of the Northern Plains Intertribal Court of Appeals, served January 23, 1992, affirming the decision of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation that the Tribal Court has jurisdiction over an action brought by the Fredericks against plaintiffs, A-1 Contractors and Lyle Stockert.

II. JURISDICTION

2. The District Court has jurisdiction pursuant to Title 28 U.S.C. § 1331, 28 U.S.C. § 1343 and 25 U.S.C. § 1302(8). The Three Affiliated Tribes of the Fort Berthold Indian Reservation is a federally recognized Indian tribe with a governing body duly recognized by the Secretary of the Interior and the case arises under the Constitution, laws, and treaties of the United States. In addition, this case involves the federal question of the extent to which an Indian tribe can assert civil jurisdiction over non-Indians.

III. PARTIES

3. Plaintiff A-1 Contractors is a non-Indian-owned construction company owned in part by plaintiff Lyle Stockert and having its office in Dickinson, North Dakota.

4. Plaintiff Lyle Stockert is a non-Indian residing in Dickinson, North Dakota.

5. Defendant Honorable William D. Strate is an Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. Judge Strate has been assigned the action brought by Fredericks against the plaintiffs.

6. Defendant Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation is the judicial entity created by the governing body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, a federally recognized Indian Tribe.

7. Defendant Gisela Fredericks is a non-Indian residing on the Fort Berthold Indian Reservation.

8. Defendants Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks are the adult sons of defendant Gisela Fredericks.

IV. FACTS

9. On November 9, 1990, Stockert was driving an A-1 Contractor's gravel truck north on Highway No. 8, north of Twin Buttes, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation. Stockert was confronted with a southbound vehicle driven on the wrong side of the road by Gisela Fredericks. Stockert avoided a head-on collision with Fredericks by braking and turning his trunk [sic] into the right hand ditch. Fredericks' vehicle struck the truck.

10. After the accident, Gisela Fredericks and her five adult sons brought an action in the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation against A-1 and Stockert. Gisela Fredericks seeks damages for personal injuries she received in the accident from A-1 and Stockert. Gisela Fredericks' adult sons seek damages for loss of Gisela's consortium. The Fredericks seek compensatory damages in excess of \$3,032,000.00. and punitive damages in the amount of \$10,000,000.00.

11. A-1 Contractors and Stockert made special appearances in the Tribal Court and objected to jurisdiction. On June 14, 1991, Lyle Stockert filed a motion to dismiss the action against him on the ground that the Tribal Court lacks jurisdiction over the subject matter. A-1 joined in the motion to dismiss. The Tribal Court denied

the motion to dismiss by memorandum opinion dated September 4, 1991 from the Honorable William D. Strate. A-1 and Stockert appealed the Tribal Court decision to the Northern Plains Intertribal Court of Appeals. The Fredericks responded to the appeal and moved the Appellate Court to dismiss the appeal arguing that the Tribal Court's order was not appealable. The Intertribal Court of Appeals in a decision served January 23, 1992, denied the motion to dismiss finding that "the appeal was timely and the issue of jurisdiction is appealable." The Appellate Court, affirmed the Tribal Court's determination that it has jurisdiction to hear the action.

12. The courts of the State of North Dakota have jurisdiction to hear the Fredericks' claims against A-1 Contractors, Lyle Stockert, and Continental Western.

13. The plaintiffs have exhausted their tribal court remedies as required by *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

V. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court:

1. Adjudge and declare that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation does not have subject matter jurisdiction over the Fredericks' action against plaintiffs A-1 Contractors and Lyle Stockert.

2. Enjoin the Fredericks from proceeding against the plaintiffs in Tribal Court.

3. Enjoin the Tribal Court from asserting jurisdiction over the plaintiffs.

4. Grant such other relief as may be just and proper under the circumstances.

5. Award the plaintiffs their costs, disbursements, and attorney's fees.

Dated this 5th day of February, 1992.

ZUGER, KIRMIS, BOLINSKE &
SMITH

Attorneys for Plaintiffs

P.O. Box 1695

Bismarck, ND 58502-1695

BY: /s/ Michael G. Fiergola

Michael G. Fiergola

Patrick J. Ward

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
Southwestern Division

A-1 Contractors and Lyle)	
Stockart,)	
)	
Plaintiffs,	)	CASE NO.
	)	A1-92-024
v.)	
)	
Honorable William L. Strate,)	
Associate Tribal Judge of the	)	TRIBAL
Tribal Court of the Three	)	DEFENDANTS'
Affiliated Tribes of the Fort	)	AMENDED
Berthold Indian Reservation; the	)	ANSWER
Tribal Court of the Three)	
Affiliated Tribes of the Fort	)	(Filed Apr. 6, 1992)
Berthold Indian Reservation;)	
Lyndon Benedict Fredericks;)	
Kenneth Lee Fredericks; Paul)	
Jonas Fredericks; Hans Christian)	
Fredericks; Jeb Pius Fredericks;)	
Kenneth Lee Fredericks on)	
behalf of Gisela Fredericks; and)	
Gisela Fredericks,)	
)	
Defendants.)	
)	

Defendants, the Honorable William L. Strate, Associate Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (hereinafter the Tribal Defendants), file this amended answer, as of course under the provisions of Fed. R. Civ. P. 15(a).

I. ADMISSIONS AND DENIALS

1. Admit; but the Tribal Defendants affirmatively allege that the opinion of the Northern Plains Intertribal Court of Appeals in this case is dated January 8, 1992.

2. Regarding the first sentence, that sentence contains conclusions of law to which an admission or denial is not required. Nevertheless, the Tribal Defendants deny that this Court would have jurisdiction over this action under 28 U.S.C. § 1343 or 25 U.S.C. § 1302(8). Also, the Tribal Defendants affirmatively allege that, absent an express waiver of immunity, sovereign immunity precludes this Court from having jurisdiction over them.

Regarding the second sentence, the Tribal Defendants admit the allegations insofar as they allege that the Three Affiliated Tribes of the Fort Berthold Indian Reservation is a federally recognized Indian tribe. However, the remainder of the sentence calls for a legal conclusion to which an admission or denial is not required.

Regarding the third sentence, this calls for a conclusion of law to which an admission or denial is not required.

3. The Tribal Defendants are without knowledge or information sufficient to form a belief regarding the truth of the allegations set forth in this paragraph.

4. The Tribal Defendants are without knowledge or information sufficient to form a belief regarding the truth of the allegations set forth in this paragraph.

5. Admit; however, the Tribal Defendants affirmatively allege that the Associate Tribal Judge is named William L. Strate.

6. Admit.

7. Admit.

8. Admit; however, the Tribal Defendants affirmatively allege that the defendants named in this paragraph are enrolled members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation.

9. The Tribal Defendants are without knowledge or information sufficient to form a belief regarding the truth of the allegations contained in this paragraph.

10. Regarding the first sentence, the Tribal Defendants admit that sentence, but affirmatively allege that another defendant originally named in Tribal Court was Continental Western Insurance Company. By Tribal Court order dated February 4, 1992, pursuant to stipulation by the parties, Continental Western Insurance Company was dismissed without prejudice as a party defendant. The Tribal Defendants admit the remaining allegations in this paragraph.

11. The Tribal Defendants admit generally the allegations in this paragraph; however, the Tribal Defendants affirmatively allege that the Associate Tribal Judge is named William L. Strate and that the opinion of the Northern Plains Intertribal Court of Appeals is dated January 8, 1992.

12. The allegation contains a conclusion of law to which an admission or denial is not required. Nevertheless, the Tribal Defendants deny that state courts have jurisdiction over civil causes of action arising within the exterior boundaries of Indian reservations.

13. The allegations present conclusions of law to which an admission or denial is not required.

II. AFFIRMATIVE DEFENSES

1. The Tribal Defendants are not subject to this suit on the grounds of sovereign immunity; however, the immunity of the Tribal Defendants has been waived by the Tribal Business Council, Resolution #92-025-JJR (certified copy attached hereto), for the following limited purpose: to remain in this action in federal court to defend the claim for declaratory relief raised by plaintiffs regarding the issue of tribal court civil jurisdiction; provided that, the waiver of immunity does not extend to other causes of action, claims, issues, relief, or liability, in this action or any other, now or in the future.

2. The plaintiffs have failed to state a claim upon which relief can be granted.

III. PRAYER FOR RELIEF

WHEREFORE, the Tribal Defendants pray:

1. That this Court find that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has civil subject matter jurisdiction under federal law over the underlying action in this case against plaintiffs which arose within the exterior boundaries of the Fort Berthold Indian Reservation;

2. That this Court find that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has personal jurisdiction under federal law over the plaintiffs in this case in the underlying action which

arose within the exterior boundaries of the Fort Berthold Indian Reservation;

3. That this Court deny plaintiffs' requests for declaratory and injunctive relief;

4. That this Court award the Tribal Defendants their costs of suit, including attorneys fees; and

5. That this Court determine, adjudge, and decree such further relief as it deems proper.

Dated this 6 day of April, 1992

/s/ Urban J. Bear Don't Walk
Urban J. Bear Don't Walk
Legal Department
Three Affiliated Tribes
of the Fort Berthold Indian
Reservation
PO Box 220
New Town ND 58763
(701) 627-3621
Counsel for the Tribal
Defendants

RESOLUTION NO. 92-025-JJR

RESOLUTION OF THE GOVERNING BODY OF
THE THREE AFFILIATED TRIBES OF
THE FORT BERTHOLD RESERVATION

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities [sic] on behalf of and in the interest of the welfare and benefits of the enrolled members thereof; and

WHEREAS, Article VI, Section 3 of the Constitution of the Three Affiliated Tribes specifically authorizes and empowers the Tribal Business Council to exercise all sovereign authority - legislative and judicial [sic] within the scope of the jurisdiction recognized in Article I of the Constitution; that is, all persons and all lands within the exterior boundaries of the Fort Berthold Reservation; and

WHEREAS, Article VI, Section 3 of the Constitution of the Three Affiliated Tribes further specifically authorizes the Tribal Business Council to delegate to the Tribal Court such judicial power and authority as may be necessary to realize the jurisdiction recognized in Article I of the Constitution; and

WHEREAS, By Chapter 1, Section 2 of the Law and Order Code of the Three Affiliated Tribes, the Tribal Council has created the Tribal Court system; and

WHEREAS, The Tribal Court and the Associated Tribal Judge, Willian [sic] L. Strate, have been named as defendants in an action filed February 5, 1992 in the federal district court for North Dakota, captioned *A-1 Contractors and and [sic] Lyle Stockart v. Honorable William D. Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the*

Fort Berthold Indian Reservation, et al., #A1-92-024; and

WHEREAS, This action raises important issues of Tribal Court jurisdiction over civil actions arising within the Tribe's jurisdiction [sic] as recognized in Article 1 of the Constitution; and

WHEREAS, As a sovereign government, the Trhee [sic] Affiliated Tribes, including all branches and entities of the government, is immune from suit under the doctrine of sovereign immunity; and

WHEREAS, Pursuant to Article VI, Section 3 and Section 3 (a) of the Constitution, the Tribal Business Council has the authority to waive the immunity of the judicial branch of the tribal government; and

WHEREAS, The aforementioned matters have been presented to and discussed with the Tribal Business Council; and

WHEREAS, The Tribal Business Council has carefully considered the matter recognizes the importance of the issues raised by the aforementioned federal court action, and accordingly wishes to have the Tribal Court and the Associate Tribal Judge remain in the federal court action for the sole purpose of protecting, presenting, and asserting the claims to tribal court jurisdiction [sic] on behalf of the Tribe;

NOW THEREFORE BE IT RESOLVED, That the sovereign immunity of the Tribal Court and the Associate Tribal Judge is hereby waived for the limited purpose of remaining in the federal court action, *A-1 Contractors and Lyle Stockart v. Honorable William D. Strate,*

Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al., #A1-92-024, to protect, present, and assert the issue of tribal court jurisdiction; provided that, this waiver of immunity does not extend to other claims or issues in this action or any other now or [sic] in the future.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation [sic], hereby certify that the Tribal Business Council is composed of 7 members of whom 5 constitute a quorum, 6 were present at a Special Meeting thereof duly called, noticed, convened, and held on the 20th day of March, 1992; the forgoing Resolution was duly adopted at such meeting by the affirmative vote of 6 members, 0 members opposed, 0 members abstained, 0 members not voting and that said Resolution has not been rescinded or amended in any way.

Dated the 20th day of March, 1992.

/s/ John J Rabbithead Jr.
Secretary, Tribal
Business Council

ATTEST:

/s/ Wilber D. Wilkinson
Wilber D. Wilkinson
Chairman, Tribal Business Council

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A-1 Contractors, and Lyle Stockert,)	
)	
Plaintiffs,)	
)	
v	)	Civil No.
	)	A1-92-24
Honorable William D. Strate,)	
Associate Tribal Judge of the Tribal)	
Court of the Three Affiliated)	
Tribes of the Fort Berthold Indian)	
Reservation, The Tribal Court of)	
the Three Affiliated tribes of the)	
Fort Berthold Indian Reservation,)	
Lyndon Benedict Fredericks,)	
Kenneth Lee Fredericks, Paul Jonas)	
Fredericks, Hans Christian)	
Fredericks, Jeb Pius Fredericks,)	
Kenneth Lee Fredericks on behalf)	
of Gisela Fredericks, and Gisela)	
Fredericks,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

(Filed Sep. 16, 1992)

This is an action for declaratory and injunctive relief brought by A-1 Contractors and its employee, Lyle Stockert, defendants in a Tribal Court action, against the Tribal Court Judge, the Tribal Court and the plaintiffs in the Tribal Court action. A-1 and Stockert challenge the Tribal Court's assumption of jurisdiction over a tort action

resulting from automobile collision which occurred on the reservation.

This court has jurisdiction under 28 U.S.C. § 1331, to determine the extent of Tribal Court jurisdiction, since A-1 has exhausted Tribal Court remedies pursuant to the rule in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Additionally, the Tribal defendants have consented to jurisdiction for the limited purpose of defending the federal law claims for the injunctive relief sought in this action.

The parties have filed summary judgment motions on the issue of Tribal Court jurisdiction. Also before the court is a motion to strike certain exhibits and a motion to amend complaint.

FACTS

On November 9, 1990, Gisela Fredericks was involved in an automobile accident with a gravel truck owned by A-1 Contractors and driven by Lyle Stockert. The parties agree the accident occurred north of Twin Buttes, North Dakota, on North Dakota State Highway 8, within the exterior boundaries of the Fort Berthold Reservation. At the time of the collision, A-1 was performing under a contract it had with a tribal-owned corporation.

Fredericks suffered extensive injuries, and incurred medical bills in the amount of \$30,000. Although Fredericks is not an enrolled member of the tribe, she owns property on the reservation, her deceased husband was an enrolled member and her five children are enrolled members. The facts are in dispute as to whether or not

Fredericks resides on the reservation. Stockert is not a member of the tribe and A-1 is a North Dakota corporation.

Fredericks and her five children brought an action in the Tribal Court of the Three Affiliated Tribes against A-1 and Stockert, seeking damages for personal injuries and for loss of consortium. A-1 filed a motion to dismiss for lack of personal and subject matter jurisdiction.

The Tribal Court denied the motion to dismiss, finding that the tribal code authorized Tribal Court jurisdiction over the parties. The Tribal Judge reasoned that Gisela Fredericks, as a resident of the Fort Berthold Reservation, has the right to avail herself on the Tribal Court system to prosecute any claims which arose within the reservation boundaries. The Tribal Court also found that jurisdiction was proper over A-1 contractors, because it entered upon and transacted business within the territorial boundaries of the reservation.

The Tribal Court concluded that A-1 Contractors failed to identify any federal law, treaty provision or provisions of the United States Constitution which would preclude exercise of jurisdiction by the Tribal Court. The Tribal Court opinion was affirmed by the Northern Plains InterTribal Court of Appeals.

A-1 Contractors then brought an action in federal court, requesting this court to issue an order declaring that Tribal Court does not have jurisdiction over the case and enjoin the Fredericks from proceeding against A-1 contractors in Tribal Court.

The issue presented is whether or not the Tribal Court has personal and subject matter jurisdiction over a tort action arising from an automobile accident occurring on the reservation between two non-Indians.

ANALYSIS

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). The evidence is viewed in the light most favorable to the non-moving party and the non-moving party enjoys the benefit of all reasonable inferences to be drawn from the facts. *Id.* at 1339. The mere existence of some alleged factual dispute, however, will not defeat an otherwise properly supported motion for summary judgment if there is no genuine issue of material fact. *Id.* If the moving party meets its initial burden of production with credible evidence which convincingly shows there is no genuine issue of material facts, the opposing party must come forward with specific facts that demonstrate a genuine issue for trial. *Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848, 850 (8th Cir. 1983). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The only factual dispute is whether Gisela Fredericks resides on the reservation. The tribe filed a motion to strike any exhibits relating to the residency status of Fredericks, and urge the court adopt the lower court's findings that Fredericks resides on the reservation. The issue of residency was not raised before the tribal or appellate court. A-1 raises the issue of residency for the first time in this court.

The fact that Fredericks may or may not reside on the reservation is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians. If the court determines that the Tribal Court has jurisdiction over A-1 pursuant to the tribal code, the Tribal Court would necessarily have jurisdiction over Fredericks under a similar analysis. Although both the Tribal Court and the appellate court assumed Fredericks was a resident, it is not relevant in the analysis of whether or not the tribe retains jurisdiction.

Moreover, the tribe's core argument is that tribal jurisdiction is premised upon a geographic territory. The plaintiffs' principal argument is that tribal jurisdiction is only present if at least one of the parties is a member of the tribe. Neither theory depends on the residency of Gisela Fredericks at the time of the accident. Therefore, there is no material factual dispute and the court finds summary judgment to be appropriate disposition of this matter.

In regard to tribal civil jurisdiction over non-Indians, the United States Supreme Court has stated:

Tribal authority over the activities of non-Indians on reservation lands is an important

part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mut. Ins. Co. v. Laplante, 480 U.S. 9, 18 (1987) (citations omitted).

Tribal courts do not have inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Oliphant*, the Supreme Court found that congressional action granting jurisdiction to the federal courts to try non-Indians for offenses committed in Indian Country implicitly preempted tribal jurisdiction. *Id.* at 204. However, the civil jurisdiction of Tribal Court has not been similarly restricted, and the development of the principles governing civil jurisdiction have been different than those governing criminal jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985) (Supreme Court refused to extend *Oliphant* to case involving tribal civil jurisdiction).

In a recent decision regarding tribal criminal jurisdiction, the Supreme Court recognized that Tribal Courts retain civil jurisdiction over disputes involving non-Indians. The court stated that the civil jurisdiction of the tribe over non-Indians typically arises in cases of property ownership within the reservation or "consensual relationships with the tribe or its members through commercial dealing, contracts or other arrangements." *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053, 2061 (1990) (citing *Montana*).

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court found that there were two circumstances

in which a tribe may retain civil jurisdiction over non-members. *Id.* at 565-66. First, a tribe may regulate, through taxation and licensing, activities of non-Indians who enter consensual relationships with the tribe and its members. Secondly, the tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

The Tribal Court determined that a tort committed on the reservation, in the course of a performance of a contract with the tribe, has a direct effect on the welfare of the tribe and thus the second exception to *Montana* was satisfied in this case. The appellate court affirmed, concluding that absent a congressional directive it could find no compelling reason not to give the tribe jurisdiction.

Although the Supreme Court has not reached the issue of tribal civil jurisdiction over two non-Indians, a recent ninth circuit case does indirectly address the matter. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992). In *Stock West*, an Oregon corporation brought an action in federal district court against a tribal attorney who was also a non-Indian, alleging the attorney committed malpractice in drafting an opinion letter.

The district court dismissed the case, finding that the subject matter of the letter involved tribal concerns and that the corporation should first exhaust tribal remedies. The ninth circuit, *en banc*, affirmed, determining the fact that the corporation was non-Indian did not preclude tribal civil jurisdiction. *Id.* at 918. The court concluded

that the best argument against tribal jurisdiction was that the opinion letter was delivered off the reservation. *Id.*

A-1 contends that *Montana* is controlling in this case and precludes Tribal Court jurisdiction over the personal injury action. A-1 argues that this case does not fall within the two exceptions announced in *Montana*. A-1 argues that there are no consensual relationships present in this case and asserts that the alleged tort between non-Indians does not have a direct effect on the health or welfare of the tribe.

The tribal defendants disagree, arguing that *Montana* only applies in cases of non-Indian fee lands, and this dispute involves an accident which occurred on the reservation. The tribe argues that assuming *Montana* applies, it does allow for jurisdiction in a case of a tort committed on the reservation because of the serious nature of the tort. The tribe argues that because A-1 is performing under a contract with the reservation, it is necessarily subject to tribal jurisdiction for torts committed in the course of performance of that contract on the reservation. Thus, the tribe contends that both prongs of the *Montana* test are satisfied. The tribe notes that A-1 agreed in its contract with the tribal-owned corporation to be bound by the tribal building codes, employment rights codes and "the laws regulations and directives of applicable governing authorities."

A-1 also argues that the burden is on the Fredericks to cite to a treaty or statute which expressly gives the Three Affiliated tribes authority to conduct civil lawsuits

against non-Indians in Tribal Court. The defendants disagree, stating that jurisdiction is presumed unless otherwise limited by treaty or statute.

The applicable tribal code provisions are as follows:

Chapter 1, Section 3: Jurisdiction of the Courts

Subsection 3.2 – Jurisdiction – Territorial

The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Subsection 3.3 – Jurisdiction – Personal

Subject to any limitations or restrictions imposed by the constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Subsection 3.5 – Jurisdiction – Subject Matter

The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2, Section 3(f): Long Arm Statute. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

- 1) The transaction of any business of the Reservation;
- 2) The commission of any act which results in accrual of a tort action within the Reservation;
- 3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

The court finds that the Tribal Court was correct when it found that it had jurisdiction over this dispute. The tribal code clearly provides for personal jurisdiction over Fredericks, Stockert and A-1 Contractors. The tribe has jurisdiction over Fredericks because she elected to bring her action in Tribal Court. She exercised a discretionary choice of forum. The tribe has jurisdiction over Stockert because he entered the reservation, and he committed an act which resulted in the accrual of a tort action within the reservation. The tribe has jurisdiction over A-1 Contractors because it entered the Reservation and transacted business on the Reservation.

The tribal code also provides for subject matter jurisdiction over the tort action. Section 3.5 of the code states that "the Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation . . ." The tort action arose within the exterior boundaries of the Reservation and therefore the Tribal Court has subject matter jurisdiction.

The law is clear that Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute. *See Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9 (1987). That jurisdiction is not exclusive. Here it is

invoked by plaintiffs' choice of forum. There has been no such limitation over civil causes of action arising on the reservation between two non-Indians, and therefore, the court **HEREBY DENIES** the plaintiffs' request for relief.

Based on the foregoing, it is the **ORDER** of the court:

1. The Fredericks' motion for summary judgment is **GRANTED**. (doc. #13).
2. The plaintiffs' motion for summary judgment is **DENIED**. (doc. #19).
3. The tribal defendants' cross-motion for summary judgment is **GRANTED**. (doc. #29).
4. The tribal defendants' motion to strike the exhibits is **GRANTED**. (doc. #31).
5. The motions for oral argument are **DENIED**. (doc. # 33, 49)
6. The plaintiffs motion to amend pleadings is **DENIED**. (doc. #43)

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 16th day of September 1992.

/s/ Patrick A Conmy
Patrick A. Conmy, Chief Judge
United States District Court

Civil No. A1-92-24

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 16 day of Sept. 1992.

EDWARD J. KLECKER, CLERK

By: /s/ Deborah Thomason
Deputy

UNITED STATES DISTRICT COURT
SOUTHWESTERN DISTRICT OF NORTH
DIVISION DAKOTA

A-1 Contractors, and Lyle
 Stockert,

v.

Honorable William D. Strate,
 Associate Tribal Judge of the
 Tribal Court of the Three
 Affiliated Tribes of the Fort
 Berthhold Indian Reservation, et
 al.,

**JUDGMENT IN A
 CIVIL CASE**

CASE NUMBER:
 A1-92-24

(Filed
 Sep. 16, 1992)

- [] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- [X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That pursuant to the Memorandum and Order entered this date that Fredericks' motion for summary judgment is GRANTED. The plaintiffs' motion for summary judgment and to amend pleadings is DENIED. The tribal defendants' cross-motion for summary judgment is GRANTED and the motion to strike the exhibits is GRANTED. The motions for oral argument are DENIED. The above entitled action is dismissed with prejudice.

September 16, 1992
 Date

EDWARD J. KLECKER
 Clerk

/s/ Deborah Thomason
 (By) Deputy Clerk

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 92-3359

A-1 Contractors;	*	
Lyle Stocker,	*	
	*	
Appellants,	*	
v.	*	Appeal from the United
Honorable William Strate,	*	States District Court for the
Associate Tribal Judge of	*	District of North Dakota
the Tribal Court of the	*	
Three Affiliated Tribes	*	
of the Fort Berthold	*	
Indian Reservation; Three	*	
Affiliated Tribes of the	*	
Berthold Indian	*	
Reservation, The Tribal	*	
Court; Lyndon Benedict	*	
Fredericks; Kenneth Lee	*	
Fredericks; Paul Jonas	*	
Fredericks; Hans Christian	*	
Fredericks; Jeb Pius	*	
Fredericks; Gisela	*	
Fredericks,	*	
Appellees.	*	

Submitted: June 16, 1993

Filed: November 29, 1994

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON,
Senior Circuit Judge, and HANSEN, Circuit Judge.

McMILLIAN, Circuit Judge.

A-1 Contractors and Lyle Stockert appeal from a final order entered in the District Court¹ for the District of North Dakota denying their motion for summary judgment and granting summary judgment in favor of appellees, the Frederickses and the tribal defendants (described further below). *A-1 Contractors v. Strate*, Civil No. A1-92-24 (D.N.D. Sept. 17, 1992) (*Strate*). For reversal, appellants argue the district court erred in holding the tribal court had subject matter jurisdiction over this civil cause of action between non-Indians that arose on an Indian reservation. Appellants argue that although the tribe retains sovereignty to control its own internal relations, it has been divested of any authority over non-members' activities that do not substantially affect those internal relations. For the reasons discussed below, we affirm the order of the district court granting summary judgment in favor of appellees and reserving the matter for tribal court jurisdiction.

I.

On November 9, 1990, Stockert was driving a gravel truck owned by A-1 Contractors when the truck collided with a car driven by Gisela Fredericks. Mrs. Fredericks suffered serious injuries which required her to be hospitalized for 24 days. In May 1991 Mrs. Fredericks and her adult children (collectively referred to as the Frederickses) sued appellants and Continental Western

¹ The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

Insurance Co.² in the Tribal Court for the Three Affiliated Tribes³ of the Fort Berthold Indian Reservation seeking damages in excess of \$13 million for personal injury, loss of consortium and medical expenses.

At the time of the accident, appellants were working on the reservation under a subcontract agreement with LCM Corp., a corporation wholly owned by the tribe. Under the subcontract, appellants did certain excavating, berming and recompacting work in connection with the construction of a tribal community building. All of appellants' work under the subcontract was performed within the boundaries of the reservation. Appellants are not members of the tribe nor residents of the reservation. Mrs. Fredericks is a non-tribal member resident of the reservation.⁴

Appellants made a special appearance in tribal court and moved to dismiss the action for lack of personal and subject matter jurisdiction. The tribal court denied the motion and found it had personal and subject matter

² Continental Western Insurance Co., A-1 Contractors' insurer, was a party to the proceedings before the tribal court and the tribal appellate court; however, on February 3, 1992, the insurer was dismissed as a defendant in the district court without prejudice and is not a party to this appeal.

³ The Three Affiliated Tribes - Mandan, Hidatsa and Arikara - are federally recognized Indian tribes (hereinafter "the tribe") which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

⁴ Although Mrs. Fredericks is not a member of the tribe, her late husband was a tribal member and her adult children are enrolled members of the tribe.

jurisdiction. *Fredericks v. Continental Western Insurance Co.*, No. 5-91-A04-150, slip op. at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991) (*Fredericks I*). Specifically, the tribal court found it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because appellants "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also determined that it had subject matter jurisdiction over the action as an incident of inherent tribal sovereignty unlimited by treaty or federal statute. *Id.* at 1.24(d) (invoking the second Montana exception).

Appellants then appealed to the Northern Plains Intertribal Court of Appeals, which affirmed the decision of the tribal court. *Fredericks v. Continental Western Insurance Co.*, Northern Plains Intertribal Ct. App. (Jan. 8, 1992) (*Fredericks II*). The tribal court of appeals remanded the case to the tribal court for further proceedings. No further proceedings had occurred in tribal court when appellants filed a complaint in federal district court on February 5, 1992, against the Frederickses and the Honorable William D. Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court (hereinafter referred to as the tribal defendants). Appellants sought declaratory relief and to enjoin the Frederickses from proceeding against them in tribal court and to enjoin the tribal defendants from asserting jurisdiction over them.

The tribal defendants answered and initially raised the affirmative defense of sovereign immunity; however,

the tribal defendants later consented to suit for the limited purpose of defending the federal law claims for injunctive relief. Appellants, the Frederickses and the tribal defendants filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied appellants' motion and granted the Frederickses' and the tribal defendants' cross-motions for summary judgment. *Strate*, slip op. at 10. The district court first decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation and that this factual dispute was irrelevant to the issue of tribal court jurisdiction. *Id.* at 5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, even though none of the parties was a tribal member, finding that tribal courts have jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute and no such limitation was shown to apply here. *Id.* at 9-10. This appeal followed.

II.

We review the grant or denial of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *Ford v. Dowd*, 931 F.2d 1286, 1289 (8th Cir. 1991).

Specifically, we must determine whether the district court correctly decided that the tribal court had subject matter jurisdiction to hear the present case. Tribal court jurisdiction is a question of federal law reviewed de novo. *Stock West Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992) (banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).

Appellants argue the district court erred in holding there is tribal court jurisdiction because the limited inherent sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between non-Indians. Appellants cite in support *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), *United States v. Wheeler*, 435 U.S. 313 (1978) (*Wheeler*), and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*).

In *Montana* the issue was whether the tribe had the authority to prohibit non-Indians from hunting and fishing on fee lands owned by non-Indians within its reservation. The Supreme Court held that it did not. The Court began its analysis by noting that although "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' . . . through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563, citing *Wheeler*, 435 U.S. at 323, 326. Although in general the tribes have lost the inherent sovereign power over the activities of nonmembers, the Court noted that "Indian tribes retain inherent

sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. First, the tribe may retain the inherent sovereign power to "regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (first *Montana* exception). In addition, the tribe may retain the inherent power to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (second *Montana* exception).

Appellants argue that the two *Montana* exceptions are the only bases upon which the tribal court may assert jurisdiction over civil disputes between non-Indians and that the present case does not fit within either exception. Appellants argue that they, Mrs. Fredericks and her adult children have not entered into any agreements or dealings with the tribe in connection with the underlying tort action so as to subject themselves to tribal court jurisdiction within the meaning of the first *Montana* exception. Appellants also argue that the underlying tort does not so threaten the tribe's political or economic security so as to warrant tribal court jurisdiction within the meaning of the second *Montana* exception.

The Frederickses and the tribal defendants argue the district court correctly held that the tribal court did have jurisdiction over a civil action brought by a non-Indian against another non-Indian arising from a tort occurring on the reservation. They argue that the tribe has retained

the inherent sovereign authority to exercise civil jurisdiction over the conduct of appellants on the reservation, notwithstanding that appellants and Mrs. Fredericks are non-tribal members, because appellants' allegedly tortious conduct had a direct effect on the welfare of the tribe. They argue that because the tort action arose on the reservation, tribal court jurisdiction is presumed and exists "unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14, 18 (1987) (*Iowa Mutual*); see also *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Stock West Corp. v. Taylor*, 964 F.2d at 918-19.

The Frederickses and the tribal defendants argue that *Montana* is inapplicable to the present case. They argue that *Montana* is limited to the issue of tribal civil jurisdiction over fee lands owned by non-Indians within the reservation and the present case does not involve fee lands owned by non-Indians. However, assuming *Montana* is applicable, they argue that both the first and second *Montana* exceptions apply and support tribal court jurisdiction in the present case. The Frederickses and the tribal defendants argue there was a consensual relationship between appellants and the tribe pursuant to the subcontract between the tribal corporation, LCM Corp., and appellants, thus satisfying the first *Montana* exception. They argue appellants voluntarily entered into the subcontract with the tribe in which appellants recognized tribal authority. All of appellants' work under the subcontract was to be performed on the reservation. In addition, they argue the allegedly tortious conduct of appellants occurred on the reservation and thus directly affected the economic security and health and general

welfare of the tribe. They argue that when a tort action arises within a reservation, especially on tribal trust land, the second *Montana* exception is satisfied.

III.

We hold the district court did not err in holding the tribal court had subject matter jurisdiction. As a preliminary matter, we note that the present case involves the issue of tribal court jurisdiction on the merits. The present case does not involve exhaustion of tribal remedies or federal court abstention. See, e.g., *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) (*Duncan Energy*), petition for cert. filed, 63 U.S.L.W. 3326 (U.S. Oct. 17, 1994) (No. 94-689). Here, tribal remedies have been exhausted. We have the benefit of the tribal courts' expertise and analysis, consistent with the federal government's long-standing policy of supporting tribal self-government, including tribal courts, and tribal self-determination. See *Iowa Mutual*, 480 U.S. at 14; *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Nor does the present case involve tribal criminal jurisdiction. *Duro v. Reina*, 495 U.S. 676, 688 ((1990) (tribal court cannot exercise criminal jurisdiction over non-tribal member); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (tribal court cannot exercise criminal jurisdiction over non-Indians). As noted earlier, the question of tribal court jurisdiction is a question of federal law which we review de novo. *Duncan Energy*, 27 F.3d at 1300.

We agree with the district court and the tribal courts that *Montana* and *Brendale* are not dispositive. We hold

that *Montana*, and the *Montana* exceptions, are inapplicable to the present case. We think the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians. *Montana* involved tribal regulation of fee lands; the Court's opinion framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547 (emphasis added), 557. *Brendale* also involved tribal regulation of fee lands. The issue was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The Court noted that fee land was located through the reservation in a checkerboard pattern, *id.* at 421, and recognized that "in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses [of fee land] on the political integrity, economic security, or the health or welfare of the tribe." *Id.* at 430-31 (referring to second *Montana* exception). See *South Dakota v. Bourland*, 113 S. Ct. 2309, 2316-17 (1993) (tribe could not regulate activities of non-tribal members on non-Indian fee lands on reservation, that is, land taken for dam project and then opened for public use as recreation area); *Brendale*, 492 U.S. at 427, 430 ("The governing principle [in *Montana*] is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee

land."); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (Montana exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); *Duncan Energy*, 27 F.3d at 1298; cf. *Stock West Corp. v. Taylor*, 964 F.2d at 920 (tortious acts committed on reservation land, business transactions commenced on tribal lands); *Red Fox v. Hettich*, 494 N.W.2d 638, 645-47 (S.D. 1993) (holding plaintiff failed to establish tribal court had jurisdiction over tort claim which occurred on state highway within reservation).

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18, citing *Montana*, 450 U.S. at 565-66, *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 (1980) (tribes may tax transactions occurring on tribal trust lands), and *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding tribe may impose taxes on business operated by non-Indians on basis of tribe's inherent sovereign authority to control economic activity within its jurisdiction); *Williams v. Lee*, 358 U.S. at 223 (state court did not have jurisdiction over civil suit by non-Indian against Indian where cause of action arose on reservation). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that

the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149 n.14. In the present case no specific treaty provision or federal statute has been shown to have affirmatively limited the power of the tribal courts over civil actions that arise on the reservation between non-Indians. We therefore hold the tribal court does have subject matter jurisdiction.

IV.

In the alternative, assuming for purposes of analysis that *Montana* is not limited to tribal authority over non-Indian fee lands, we agree with the district court and the tribal courts that the tribe retained the inherent sovereign authority to exercise civil jurisdiction over the activities of non-Indians within the reservation under both the first and second *Montana* exceptions. With respect to the first *Montana* exception, a "consensual relationship" existed between appellants and the tribe by virtue of the subcontract between A-1 and LCM Corp., a corporation wholly-owned by the tribe. The allegedly tortious conduct also occurred in connection with the performance of that subcontract on the reservation. Appellants thus subjected themselves to the civil jurisdiction of the tribal court.

With respect to the second *Montana* exception, the present case involved an automobile accident that occurred on a state highway right-of-way on the reservation. As noted above, territorial control is an fundamental component of inherent tribal sovereignty. Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within

the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The definition has been applied in a variety of contexts. See, e.g., *City of Timber Lake v. Cheyenne Sioux River Tribe*, 10 F.3d 554, 556-57 (8th Cir. 1993) (holding tribe can regulate liquor sales on fee lands owned by non-Indians within reservation), *cert. denied*, 114 S. Ct. 2741 (1994); *Red Fox v. Hettich*, 494 N.W.2d at 643 & n.7 (state highway within reservation); *Schantz v. White Lightning*, 231 N.W.2d 812, 815 (N.D. 1975) (holding state court did not have jurisdiction of civil action brought by non-Indian against Indian for injuries resulting from auto accident which occurred on state highway within reservation); cf. *Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1191-92 (D. Ariz. 1982) (holding U.S. highway right-of-way equivalent to non-Indian fee land within meaning of Montana in light of Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328), *decision vacated and injunction dissolved*, 574 F. Supp. 710 (1983). For example, this court is familiar with the conflict between state and tribal law enforcement on state highways on reservations. See *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (holding state had no civil or criminal jurisdiction over highways running through Indian country), *cert. denied*, 500 U.S. 915 (1991).

We think the tribe, like a state, has an important and legitimate interest in protecting the health and safety of

its members and residents on the roads and highways on the reservation. In addition, we think the tribe, like a state, also has an important and legitimate interest in affording those who have been injured in accidents on those roads and highways with a judicial remedy. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum. Tribal court jurisdiction is an important aspect of tribal sovereignty, and refusing to recognize its existence would have a demonstrably serious, adverse effect on the political integrity of the tribe.

Accordingly, we affirm the order of the district court granting summary judgment to appellees and reserving the matter for tribal court resolution on the merits.

HANSEN, Circuit Judge, dissenting.

Because the court's opinion departs from the well-established test for determining a tribal court's civil jurisdiction over non-Indian parties, I respectfully dissent. The court finds tribal court jurisdiction is appropriate here under what can best be described as a theory of "tribal territorial jurisdiction," which I believe is wholly unsupported by authority. I believe this case is controlled by *Montana v. United States*, 450 U.S. 544 (1981), and its

requirement that a tribal interest be involved before a tribal court may assert jurisdiction.

In *Montana*, the Supreme Court of the United States set forth the test for determining when an Indian tribe has jurisdiction over non-Indian parties. The Court found that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Id.* at 564 (citations omitted). The Court went on to find that "Indian tribes retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* at 565 (emphasis added). As the majority points out at page 6, the *Montana* Court described the two situations where this jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). This analysis of civil tribal jurisdiction over non-Indians has been reiterated a number of times by the Supreme Court. See *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993) (quoting *Montana's* observation that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *Duro v. Reina*, 495 U.S. 676, 687 (1990) (reciting *Montana's* observation that "the inherent sovereign powers of an Indian

tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality) (following *Montana* principles and finding no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation).

The court attempts to distinguish *Montana* and *Brendale* by placing an artificial limitation on their reasoning. It contends that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on fee lands within the boundaries of the reservation. While both of these cases do address questions of tribal authority over non-Indians on fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands.

The *Montana* case found, without qualification or caveat, that *tribal power* may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564 (emphasis added). *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and provided the two situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). The *Brendale* case expressly adopted the *Montana* rationale without further qualification. See *Brendale*, 492 U.S. at 426-27. Moreover, a number of cases also have cited to *Montana* in analyzing civil jurisdictional issues in non-fee land disputes. See *Stock West Corp. v.*

Taylor, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); see also *Tamiani Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the interests of Indians on Indian lands). Our court's attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of these cases.

Instead of relying on the well-established principles of *Montana* (adopted in *Brendale*), the majority pins its finding of tribal jurisdiction in this case on the concept that Indian tribes retain unfettered territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by federal law, and the majority finds no such affirmative limitation here. The majority concludes that the tribe retains sovereignty over all matters arising on tribal land unless and until that jurisdiction is limited (i.e., divested) by federal law. This near statehood-like conclusion essentially adopts the position of counsel for the tribal defendants who stated in oral argument that the tribe wants "to have jurisdiction over things that happen on the reservation," including things that involve non-Indians, because "that's what sovereign governments do, they control things that happen within their territory." I find this concept of plenary tribal territorial jurisdiction to be wholly unsupported by authority, an overly broad

interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and contrary to the law the Supreme Court set forth in *Montana*.

The majority attempts to support this idea of sovereign "tribal territorial jurisdiction" by relying on isolated language from *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Williams v. Lee*, 358 U.S. 317 (1959), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), in reaching the conclusion that tribes have retained "tribal territorial jurisdiction." None of these cases support the majority's finding of tribal civil jurisdiction. Our court's reading of *Iowa Mutual*, on which its opinion primarily relies, is unnecessarily broad and conflicts with the principles of *Montana*. *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*. Contrary to the majority's characterizations, the Court in *Iowa Mutual* simply holds that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. In *Brendale*, the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved. *Brendale*, 492 U.S. at 427 n.10.

In reaching its conclusion on the exhaustion requirement, the *Iowa Mutual* Court went on to offer the following observation which the majority relies heavily upon in reaching its decision:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities

presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Id. at 18. The majority asserts that because there is no act of Congress which purports expressly to divest the tribe of its jurisdiction in this matter, jurisdiction remains in the tribal court.

The Supreme Court's observation in *Iowa Mutual* should be read within the parameters of *Montana*, which is cited by the Court in making the observation. When the Court observes that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," the Court is referring to the type of activities, like consensual contractual relationships, that give rise to tribal authority under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," the Court is again referring to the civil jurisdiction the tribe possesses over non-Indians by virtue of the non-Indian's activities which give rise to tribal jurisdiction under *Montana*. We recently read the *Iowa Mutual* case in just such a fashion stating: "Civil jurisdiction over tribal-related activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* finds give rise to tribal jurisdiction over non-Indians or nonmembers.

The other cases upon which the majority relies also should be read within the limits of *Montana*. In *Williams*, the plaintiff was a store owner on the reservation and sued the defendants who were members of the tribe for breach of contract based on a transaction that occurred on the reservation. This fits squarely under the "consensual agreement" test for jurisdiction in *Montana*. Hence, jurisdiction was appropriate under the *Montana* principles without resort to the concept of tribal territorial jurisdiction.

Similarly, the majority reads too much into the footnote language in *Merrion*, where the Court stated the very general notion that "the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government. . . ." 455 U.S. at 149 n.14. The Court made the observation in a footnote without any further discussion about what are the "inherent attributes of sovereignty" which the Court had previously described. It is clear that the sovereignty the American Indian tribes retain is a *limited* sovereignty consistent with their dependent status. See *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1477 (8th Cir. 1994) (quoting *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978))). As the Court specifically noted in *Montana*, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565, quoted in *Duro v. Reina*, 495 U.S. at 687. Thus, for the tribe to exercise jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

A careful reading of the *Iowa Mutual*, *Williams*, and *Merrion* cases thus indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and the leading treatise on American Indian law which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law* 342-43 (1982 ed.). This well-accepted rule should be applied here.

Applying this rule, I believe that this court should first determine if there is a tribal interest involved in this case under *Montana*. I can find no tribal interest in this case which supports the tribal court's jurisdiction. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. The defendants have alleged that the "consensual relationship" test under *Montana* is satisfied because A-1 voluntarily entered into a subcontract with the tribe, and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that contract

when he was involved in the accident with Gisela Fredericks.¹ That reasoning is flawed because the dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, or out of, or within the ambit of the "consensual agreement," i.e., the subcontract, between the tribe and A-1. Gisela Fredericks was not a party to the contract, and the tribe is a stranger to the accident.

The defendants also allege that the second exception under *Montana* is satisfied because the dispute arose within the reservation and, therefore, the conduct in issue here affects the tribe's political integrity and welfare. I disagree. This case has nothing to do with the Indian tribe's ability to govern its own affairs or protect its own people's rights under tribal laws and customs. It deals only with the conduct of non-Indians and nonmembers and the tribe's self-asserted ability to exercise plenary judicial authority over a decidedly nontribal matter. I find nothing in this case even approaching a direct effect on the tribe's political integrity or welfare. Hence, there is no tribal jurisdiction under *Montana*.

In adopting what amounts to a concept of "tribal territorial jurisdiction," the majority is exalting the situs of the event above the tribal interest requirement set forth in *Montana*. Simply stated, this case is not about the tribe's ability to govern itself; it is about the tribe's claimed ability to govern others who are non-Indians and

¹ There is no proof (as opposed to allegations) that I can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident.

nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe's ability to govern itself is inherently maintained because the tribal court will have jurisdiction any time a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. However, because I find that the majority incorrectly applies the relevant authority and because there is no tribal interest involved in this case, I respectfully dissent from the court's decision finding civil tribal jurisdiction over this dispute.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359

A-1 Contractors; Lyle Stockert,	*	
Appellants,	*	
v.	*	Appeal from the
Honorable William Strate,	*	United States
Associates Tribal Judge of the	*	District Court for
Tribal Court of the Three	*	the District of
Affiliated Tribes of the Fort	*	North Dakota.
Berthold Indian Reservation;	*	
Three Affiliated Tribes of the	*	
Fort Berthold Indian Reservation,	*	
The Tribal Court; Lyndon	*	
Benedict Fredericks; Kenneth Lee	*	
Fredericks; Paul Jonas	*	
Fredericks; Hans Christian	*	
Fredericks; Jeb Pius Fredericks;	*	
Gisela Fredericks,	*	
Appellees.	*	

Submitted: May 23, 1995

Filed: February 16, 1996

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

HANSEN, Circuit Judge.

In this case, we are asked to decide whether an American Indian Tribal Court has subject matter jurisdiction over a tort case which arose out of an automobile accident which occurred between two non-Indian parties on an Indian reservation. A divided panel of this court previously concluded that the Indian tribe retained the inherent sovereign power to allow the tribal court to exercise subject matter jurisdiction over the dispute. After granting the suggestion of A-1 Contractors and Lyle Stockert to rehear this case en banc, we vacated the panel opinion. We now hold that the tribal court does not have subject matter jurisdiction over the dispute.

I.

On November 9, 1990, on a state highway on the Fort Berthold Indian Reservation in west-central North Dakota, a gravel truck owned by A-1 Contractors and driven by Lyle Stockert (an A-1 employee) and a small car driven by Gisela Fredericks collided. Mrs. Fredericks suffered serious injuries and was hospitalized for 24 days. A-1 is a non-tribal company located in Dickinson, North Dakota. Stockert is not a member of the tribe and resides in Dickinson, North Dakota. Mrs. Fredericks is not a

member of the tribe; however, she resides on the reservation, she was married to a tribal member (now deceased), and her adult children are enrolled members of the tribe.

At the time of the accident, A-1 was working on the reservation under a subcontract agreement with LCM Corporation, a corporation wholly owned by the tribe. Under the subcontract, A-1 performed excavating, berming, and recompacting work in connection with the construction of a tribal community building. A-1 performed all of the work under the subcontract within the boundaries of the reservation. The record is not clear whether Stockert was engaged in work under the contract at the time of the accident.¹

In May 1991, Mrs. Fredericks sued A-1, Stockert, and Continental Western Insurance Company (A-1's insurer), in the Tribal Court for the Three Affiliated Tribes² of the Fort Berthold Indian Reservation. Mrs. Fredericks' adult children also filed loss of consortium claims as part of the suit. Mrs. Fredericks and her adult children sought damages in excess of \$13 million for personal injury, loss of consortium, and medical expenses.

¹ There is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident. The district court made its fact-findings based on the pleadings in this case, not upon the evidence.

² The Three Affiliated Tribes – Mandan, Hidatsa, and Arikara – are federally recognized Indian tribes which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

A-1, Stockert, and Continental Western made a special appearance in tribal court and moved to dismiss the Frederickses' suit, contending that the tribal court lacked personal and subject matter jurisdiction. The tribal court denied the motion and found that it had personal and subject matter jurisdiction over the suit brought by Gisela Fredericks. *Fredericks v. Continental Western Ins. Co.*, No. 5-91-A04-150, slip op at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991). Specifically, the tribal court found that it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because A-1 had "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also concluded that it had subject matter jurisdiction over the action because its inherent tribal sovereignty had not been limited by treaty or federal statute. *See id.* at 1.24(d). Given the tribal court's conclusion that it had jurisdiction over the claims of Gisela Fredericks, the tribal court did not reach the question of its jurisdiction over the consortium claims brought by her children, who were tribal members.

A-1, Stockert, and Continental Western appealed to the Northern Plains Intertribal Court of Appeals. The Intertribal Court of Appeals affirmed the tribal court and remanded the case to the tribal court for further proceedings. *Fredericks v. Continental Western Ins. Co.*, Northern Plains Intertribal Ct. App. 1 (Jan. 8, 1992). The Intertribal Court of Appeals took a broad view of the tribe's civil authority over the non-Indians involved in this dispute:

Like any sovereign, Three Affiliated Tribes has [sic] an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction.

Slip op. at 7. Continental Western was dismissed from the case without prejudice pursuant to an agreement of the parties.

Before proceedings resumed in the tribal trial court, A-1 and Stockert filed this case in the United States District Court for the District of North Dakota against Mrs. Fredericks and her children (hereinafter "the Frederickses"), the Honorable William Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court itself. A-1 and Stockert sought injunctive and declaratory relief. They asked the district court to declare that the tribal court had no jurisdiction over this matter, to enjoin the Frederickses from proceeding against them in the tribal court, and to enjoin the tribal judge and the tribal court (hereinafter the "tribal defendants") from asserting jurisdiction over them.

The tribal defendants initially raised the affirmative defense of sovereign immunity, but subsequently consented to the suit for the limited purpose of defending the federal law claims for injunctive relief. Both sides filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied the summary judgment motion of A-1 and Stockert, and it granted the summary judgment motions of the Frederickses and the tribal defendants. *A-1 Contractors v. Strate*, Civil No. A1-92-94 (D.N.D. Sept. 17, 1992). The district court

decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation, which was irrelevant to the issue of tribal court jurisdiction. *Id.* at 4-5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, and concluded that Indian tribes have retained inherent sovereignty to exercise jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute. *Id.* at 9-10. The district court found that there was no treaty or statute that limited the tribe's jurisdiction in this case. *Id.* at 10. A-1 and Stockert appealed on the issue of subject matter jurisdiction over the claims of Mrs. Fredericks.³

A panel of this court affirmed the district court in a two-to-one decision. *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994). A-1 and Stockert requested review of the panel's decision en banc. We granted their request, vacated the panel opinion, and set this case for rehearing en banc.

II.

We review de novo the district court's decision both granting and denying summary judgment. *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992). We agree with the district court that this case presents no relevant

³ The consortium claims of Mrs. Fredericks' adult children are not a part of this appeal because neither the tribal courts nor the federal district court addressed the tribal courts' jurisdiction over those claims.

factual disputes for our review. The only question presented, whether the tribal court has jurisdiction over this dispute, is a question of law. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

The specific question presented for our resolution is whether the tribal court has civil jurisdiction over this dispute which arose between two non-Indian parties on the Fort Berthold Reservation. A-1 and Stockert argue that under Supreme Court case law, the tribe does not have the inherent sovereign authority to exercise civil jurisdiction over non-Indians unless the dispute implicates an important tribal interest. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *South Dakota v. Bourland*, 113 S. Ct. 2309, 2320 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality). A-1 and Stockert argue that because this case involves no such tribal interest, the district court erred in holding that the tribal court had subject matter jurisdiction over this dispute. The Frederickses and the tribal defendants (collectively "the appellees") argue that a different line of Supreme Court authority governs this issue. The appellees argue that language from this line of cases indicates that the district court correctly concluded that tribal courts have inherent civil jurisdictional authority over all disputes arising on the reservation, regardless of whether the parties involved are tribal members. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Williams v. Lee*, 358 U.S. 317 (1959). The appellees contend that the district court correctly found

that the tribe had full geographical/territorial jurisdiction over this dispute. The issue presented for our review is largely unresc'ved and has generated a great deal of interest and commentary. See, e.g., Allison S. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1 (1993) (detailing and criticizing the Supreme Court's increasing emphasis on membership-based sovereignty).

In our view, the standards articulated in *Montana v. United States*, 450 U.S. 544 (1981), and subsequent cases applying those standards, control the resolution of this dispute. In *Montana*, the Supreme Court specifically addressed the reach of tribal civil jurisdiction over non-Indian parties and found that:

the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted). The Court then announced the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.⁴

⁴ Stated another way: "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's

Indian tribes, however, do "retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* (emphasis added). This jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when a nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). These two situations are the "two exceptions" to *Montana's* general rule that an Indian tribe does not have inherent sovereign powers over the activities of nonmembers. *Bourland*, 113 S. Ct. at 2320. In our view, the tribal court in this case would not have subject matter jurisdiction under *Montana* unless the appellees can establish the existence of a tribal interest under either of the two exceptions.

The Supreme Court has reiterated or reaffirmed the *Montana* analysis of civil tribal jurisdiction over non-Indians a number of times. *Bourland*, 113 S. Ct. at 2319 (reasserting the centrality of the observation in *Montana* that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *County of Yakima v. Confederated Tribes*

dependent status, that is, to the extent it involves the tribe's 'external relations.' " *Brendale*, 492 U.S. at 425-26 (plurality) (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). The tribe's external relations are generally those involving nonmembers of the tribe. See *id.*

and *Bands of Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (citing *Montana* in referring to the "long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations"); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (criminal jurisdiction case reciting *Montana's* observation that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*), overruled by statute on other grounds, 25 U.S.C. § 1301(2) & (3); *Brendale*, 492 U.S. at 426-27 (plurality) (following *Montana* principles and concluding there was no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation). Perhaps the Court's most emphatic reiteration of these standards is its recent statement that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' " *Bourland*, 113 S. Ct. at 2320 n.15.

The appellees argue that instead of applying the *Montana* analysis, we should resolve this case under the Supreme Court's decisions in *Iowa Mutual*, *National Farmers Union*, *Williams v. Lee*, and *Merrion*. In our view, none of those cases supports the appellees' contentions that the tribal court has the broad civil subject matter jurisdiction the tribal courts and the district court found in this case. In *Iowa Mutual*, the Court held only that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. 480 U.S. at 18-19; see also *Brendale*, 492 U.S. at 427

n.10 (the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved). In reaching its conclusion on the exhaustion requirement, the Court offered the following observation upon which the appellees rely heavily:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18. The appellees argue that this language indicates that Indian tribes retain unrestricted territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by treaty or federal statute. The appellees contend that like a state, the tribe retains full sovereignty over all matters arising on the reservation unless and until that jurisdiction is divested by federal law. The appellees further argue that consistent with *Iowa Mutual*, the tribal court may exercise subject matter jurisdiction in this case because it happened on the reservation and there has been no affirmative divestment of the tribe's authority.

In our view, the appellees' reading of this isolated language from *Iowa Mutual* is unnecessarily broad and conflicts with the principles of *Montana*. This language from *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*, which the Court cites in making those observations.

When the Court observes in *Iowa Mutual* that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. We recently interpreted the *Iowa Mutual* case in just such a fashion, stating: "Civil jurisdiction over tribal-related activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

National Farmers Union, like *Iowa Mutual*, was an exhaustion case which did not decide whether tribes had jurisdiction over nonmembers. *Brendale*, 492 U.S. at 427 n.10. Nonetheless, the appellees contend that we should read *National Farmers Union* as a limitation on the reach of *Montana* because *National Farmers Union* limited the reach of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a criminal tribal jurisdiction case upon which *Montana*

relied. In *Oliphant*, the Court had concluded that tribal courts have no criminal jurisdiction over non-Indians because the tribe did not retain the inherent authority to exercise that type of jurisdiction. 435 U.S. at 208-10. The Court in *National Farmers Union* stated that "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require." 471 U.S. at 855. The appellees argue that in *National Farmers Union* the Court refused to extend *Oliphant's* limitation of inherent sovereign authority to civil cases.

The appellees fail to recognize the fact that *Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. *Montana*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe") (footnote omitted). *Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question – which would have completely prohibited civil jurisdiction over nonmembers. Instead, the Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* exceptions. 450 U.S. at 565-66. Thus, when *National Farmers Union* states that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant*, that observation is perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*. Under *Montana*, the tribe has the ability to exercise civil jurisdiction over non-

Indians when tribal interests (as defined in the *Montana* exceptions) are involved.

We also read the other cases the appellees rely upon within the limits of *Montana*. In *Williams*, the Court found that the tribal courts had jurisdiction over a suit by a non-Indian store owner on the reservation against two members of the tribe for breach of contract based on a transaction that occurred on the reservation. 358 U.S. at 218, 223. This factual situation fits squarely under the "consensual agreement" test for jurisdiction in *Montana* (the first *Montana* exception). In fact, *Montana* specifically cited *Williams* in creating the two exceptions that allow for civil jurisdiction over non-Indians. 450 U.S. at 544-45.

Similarly, the appellees read too much into language from *Merrion*, where the Court stated in a footnote: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." 455 U.S. at 149 n.14. The Court made the observation in isolation in a case dealing with the tribe's authority to impose a severance tax on non-Indians on the reservation. The Court found this taxation power was derived either from the tribe's inherent power of self-government or the power to exclude, *id.* at 149, both of which are consistent with the inherent powers the tribe retains over nonmembers described in *Montana*. Both *Merrion* and *Iowa Mutual* say essentially the same thing: the inherent attributes of sovereignty that an Indian tribe retains, which under *Montana* are very limited when dealing with non-Indians, remain intact unless affirmatively limited by the federal government.

The appellees argue that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on non-Indian fee lands – i.e., plots of land owned by non-Indians in fee simple that happen to be located within the exterior boundaries of the reservation. In our view, the appellees place an artificial limitation on those cases. While *Montana* and *Brendale* address questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands. To the contrary, the *Montana* Court found, without any qualification whatsoever, that *tribal power* may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564. *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and provided the two limited situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). Thus, *Montana* explicitly addressed the authority of tribes to exercise civil jurisdiction on the reservation, as well as on non-Indian fee lands. The *Brendale* plurality noted that *Montana* involved regulation of fee lands, but it did not specifically limit the *Montana* rationale to fee land disputes. See *Brendale*, 492 U.S. at 426-27. Since *Brendale*, the Supreme Court likewise has not seen fit to limit either *Montana* or *Brendale* in the fashion the appellees have suggested. Instead, the Court has discussed these cases and their observations about tribal jurisdiction in broad and unqualified language. See *Bourland*, 113 S. Ct. at 2319; *County of Yakima*, 502 U.S. at 267; *Duro*, 495 U.S. at 687.

Moreover, a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*. See *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC*, 905 F.2d at 1314 (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); see also *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the interests of Indians on Indian lands). Thus, we conclude that any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of those two cases.

The appellees next argue that we should read the *Montana* line of cases as addressing tribal regulatory power over non-Indians and the line of cases represented by *Iowa Mutual* as addressing tribal adjudicatory power over non-Indians. They contend that *Iowa Mutual* and related cases would control in this case, which is a dispute about tribal adjudicatory power. The appellees assert that drawing such a distinction would be the best way to resolve what they see as the apparent contradiction between the language from those differing lines of cases.

Again, we must disagree. While the distinction the appellees propose appears in some commentaries, see, e.g., Dussias, 55 U. Pitt. L. Rev. at 43-78, the distinction does not appear explicitly, or even implicitly, anywhere in the case law. *Montana* and the cases following *Montana*

have dealt with questions of civil tribal regulatory jurisdiction, but those cases have never suggested that their reasoning is limited solely to regulatory matters. Quite the contrary, as we have noted above, those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction. Likewise, *Iowa Mutual* and the other cases the appellees rely on have never suggested such a distinction. In fact, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to regulatory jurisdiction. *Iowa Mutual*, 480 U.S. at 18.

Moreover, any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction in this case would be illusory. If the tribal court tried this suit, it essentially would be acting in both an adjudicatory capacity and a regulatory capacity. At oral argument, all of the parties agreed that if the tribal court tried this case, it would have the power to decide what substantive law applies. Essentially, the tribal court would define the legal relationship and the respective duties of the parties on reservation roads and highways. Thus, while *adjudicating* the dispute, the tribal court also would be *regulating* the legal conduct of drivers on the roads and highways that traverse the reservation. Accordingly, we see no basis in this case for applying the regulatory-adjudicatory distinction the appellees have proposed.

Furthermore, even if we applied a regulatory-adjudicatory distinction, it would not change our conclusion. None of the cases, including those that the appellees argue are "adjudicatory jurisdiction" cases, have ever

addressed the issue presented here – a tribal court's civil jurisdiction over an accident involving non-Indian parties. As we have demonstrated above, all of the appellees' proposed "adjudicatory" cases are consistent with the *Montana* case. Even if we were to treat *Montana* as a "regulatory" authority case, we see no reason not to apply its principles to this open question of inherent authority to exercise civil adjudicatory jurisdiction over this dispute. Thus, we see no valid basis for distinguishing or limiting *Montana*, as the appellees suggest.

Arguably, some of the language from *Iowa Mutual, Williams*, and *Merrion* can be viewed in isolation to create tension with *Montana*. A careful reading of the particular language of those cases, however, indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and by the leading treatise on American Indian law, which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law*, 342-43 (1982 ed.). This well-accepted rule controls this case.

Finally, the appellees urge us to follow a recent decision in a case factually very similar to this case, where the

Ninth Circuit held that the tribal court had jurisdiction over the lawsuit. See *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994). In *Hinshaw*, Christian Mahler died from injuries he received when a car driven by Lynette Hinshaw collided with the motorcycle Mahler was riding on a U.S. highway within the boundaries of the Flathead Indian Reservation. Both Mahler and Hinshaw were residents of the reservation, but they were not members of the tribe. *Id.* at 1180. Mahler's mother (an enrolled member of the tribe) and Mahler's father (a nonmember) brought wrongful death and survivorship actions in the tribal court. Hinshaw challenged the tribal court's personal and subject matter jurisdiction in federal district court. The Ninth Circuit affirmed the district court's conclusion that the tribal court had jurisdiction over those claims. *Id.* at 1180-81. To the extent that Hinshaw supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it. Such a broad interpretation of civil tribal jurisdiction is, we believe, inconsistent with *Montana*.

The authority is quite clear that the kind of sovereignty the American Indian tribes retain is a *limited* sovereignty, and thus the exercise of authority over nonmembers of the tribe "is necessarily inconsistent with a tribe's dependent status." *Brendale*, 492 U.S. at 427 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). Stated another way, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565, quoted in *Duro v. Reina*, 495 U.S. at 687. As such, we cannot endorse the appellees' concept

of plenary tribal territorial (or geographical) civil jurisdiction. Such a concept presents an overly broad interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and is contrary to *Montana*. Thus, for the tribe to exercise civil jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

While the tribe's inherent authority to assert civil jurisdiction over a nonmember depends on the existence of a tribal interest as defined in *Montana*, that does not mean geography plays no role in the sovereignty and jurisdictional inquiry. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). In *Montana*, the Court accounted for this geographical component of the jurisdictional analysis when it stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565 (emphasis added). *Montana* implicitly recognizes that without the geographic connection to Indian country, the tribes would have no plausible grounds for asserting jurisdiction over the non-Indian parties. Thus, properly understood, the geographical component of the jurisdictional analysis is important but not dispositive. See generally *Bracker*, 448 U.S. at 151 (geographical component of tribal sovereignty is important – though not dispositive factor for courts to weigh in determining whether a state's authority to tax non-Indians for activities on reservation has been preempted).

III.

Applying *Montana* to this case, there must be a tribal interest at issue (as defined in the *Montana* exceptions) before the tribal court can exercise jurisdiction over the non-Indian parties. We conclude that no such tribal interest exists in this case. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. Those facts, which stand alone in this case, make this dispute distinctively non-tribal in nature.

The appellees argue that the "consensual relationship" test (the first *Montana* exception) is satisfied because A-1 voluntarily entered into a subcontract with the tribe and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that subcontract when he was involved in the accident with Gisela Fredericks. In our view, that reasoning is flawed. The dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit of the "consensual agreement," i.e., the subcontract between the tribes and A-1. Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident.⁵

⁵ A-1 and Stockert have noted that under the terms of the subcontract involved in this case, all disputes arising out of the subcontract would be determined under Utah law and would be heard in the Utah courts. The appellees have not argued to the contrary. However, we will not give this fact any controlling weight because the subcontract is not part of this record.

The appellees also argue that the second Montana exception is satisfied because the dispute arose on the reservation, and therefore, the conduct in dispute here necessarily affects the tribe's political integrity, economic security, or health or welfare. The appellees contend that the dispute affects the tribe's political integrity because it deals with the tribe's ability to function as a fully sovereign government. We disagree. In our view, this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and customs. It deals only with the conduct of non-Indians and the tribe's asserted ability to exercise plenary judicial authority over a decidedly non-tribal matter. The only governmental interest the tribe alleges is the right to act as a full sovereign to exercise full sovereign authority over events that happen within its geographical boundaries. As noted above, tribes are limited sovereigns and do not possess full sovereign powers. Thus, this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception.

The appellees also argue that even though Mrs. Fredericks is a non-Indian and nonmember of the tribe, she is a long-time resident of the reservation and hence is an imbedded member of the community with a recognizable social and economic value to the tribal community. Thus, they argue that it is critical to provide her a tribal forum for her disputes. The simple fact that Mrs. Fredericks is a resident of the reservation, however, does not satisfy the second *Montana* exception. It is not essential to the tribe's political integrity, economic security, or health or welfare to provide her, a non-Indian and nonmember, with a

judicial forum for resolution of her disputes. A forum is available to Mrs. Fredericks in the North Dakota state courts, and there is no indication that she would be prevented from asserting her claims, in full, in that forum.⁶

Likewise, the fact that Mrs. Fredericks wants to bring her suit in the tribal courts does not control. *Montana* very clearly states that the conduct giving rise to the case must threaten or have a "direct effect on the political integrity, economic security, or health or welfare of the tribe," not the nonmember, before the tribe can assert civil jurisdiction over nonmembers. 450 U.S. at 466 (emphasis added). Nor is it persuasive to us that Mrs. Fredericks may be as close to being a member of the tribe as she could be without actually being a member. *Montana* is very clear that tribal membership is of critical importance. Mrs. Fredericks is neither an Indian nor a member of the tribe. The fact that Mrs. Fredericks has not been admitted to membership in the tribe places her outside

⁶ There has been some discussion of the effect of 28 U.S.C. § 1360 on jurisdiction of the North Dakota state courts. That section, by its very terms, applies only to the state court's jurisdiction over actions to which Indians are parties. See also 25 U.S.C. § 1322 (similar jurisdictional provision of Indian Civil Rights Act). Because we have found that this case does not involve any Indian parties, those sections simply do not apply to this case. We note that even if applicable, those sections would tend to indicate that the North Dakota state courts have jurisdiction over this case. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986) (North Dakota's attempt to disclaim unconditional state court jurisdiction over civil claims arising in Indian country held invalid).

the reach of the tribe's inherent authority, absent some separate showing of a direct effect on the tribe. In this case, the appellees have completely failed to show that the tribe's ability to govern or protect its own members would be directly damaged if the tribe cannot assert jurisdiction over this lawsuit. Thus, the second exception to *Montana* does not apply.

IV.

Simply stated, this case is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe retains the ability to govern itself because the tribal court will have jurisdiction whenever a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. Because we have concluded that no tribal interest as defined in *Montana* exists in this case, we conclude that the tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction over this dispute through its tribal court. Accordingly, we reverse the judgment of the district court.

BEAM, Circuit Judge, with whom FLOYD R. GIBSON, McMILLIAN, and MURPHY, Circuit Judges, join, concurring and dissenting.

I concur in the court's "comprehensive and integrated" rule that "a valid tribal interest must be at issue

before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law." *Supra* at 15-16. I dissent, however, from the court's application of the rule in this case and from the implication that a tribal court has no jurisdiction in a civil case unless the dispute involves an Indian or a member of the tribe.

The concept of "tribal interest" as advanced by the court appears to be a free-floating theory wholly detached from geographic reality except in a most attenuated way. I dissent from this ideation of tribal jurisdiction because it is contrary to *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and other earlier cases, to say nothing of *Montana v. United States*, 450 U.S. 544 (1981), the case most heavily relied upon by the court.

A legitimate judicial system arises as an attribute of sovereignty. Indeed, "the existence and extent of a tribal court's jurisdiction . . . require[s] a careful examination of tribal sovereignty." *National Farmers Union*, 471 U.S. at 855. Accordingly, any determination of tribal court jurisdiction requires examination of the parts and pieces of tribal sovereignty and how they fit within the jurisdictional equation.

Historically, the connection of Indians to the land has shaped the course of Indian law. In the landmark case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), Indian

nations were recognized as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." In *Williams v. Lee*, 358 U.S. 217 (1959), the Court recognized the importance of Indian land when it decided the question of jurisdiction over a case brought in state court by a non-Indian merchant against Indian customers. Holding that the case should have been brought in tribal court, the Court stated "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

Even in more recent cases the Court has recognized the significance of geography to tribal sovereignty. In *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975), the Court noted that its cases had consistently recognized that the Indian tribes retain "attributes of sovereignty over both their members and their territory." (Emphasis added.) *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), explores a tribe's historic power to exclude others from tribal lands.

Brendale supports a rule which would allow a court to consider Indian territory in determining the tribe's interest in a given case. The plurality in *Brendale* suggests a case-by-case approach to deciding whether *Montana's* second exception confers tribal jurisdiction. The precise wording of the second exception, the plurality writes, indicates that "a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribes', but instead depends on the circumstances." *Brendale*, 492 U.S. at 429. Thus, *Brendale* suggests

that the meaning of *Montana's* second exception is not static but depends on various factors.

All of these cases further suggest that geography plays a vital role in a tribe's political integrity, economic security, health and welfare, and therefore must be strongly considered in any application of *Montana's* second exception, whether or not Indian or tribal members are parties to the dispute.

Even *Montana* lends support to the geographic component of tribal court jurisdiction. The Supreme Court stated:

[t]o be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.

450 U.S. at 565 (emphasis added). The Court in *Montana* cited its earlier holding in *United States v. Wheeler*, 435 U.S. 313 (1978) and noted that Indian Tribes are " 'unique aggregations possessing attributes of sovereignty over both their members and their territory.' " 450 U.S. at 563 (emphasis added).

In finding no jurisdiction here, the court describes tribal membership as "critical" to the Court's holding in *Montana*. *Supra* at 20. Such a characterization oversimplifies *Montana*, overstates the role tribal membership plays in a determination of tribal court jurisdiction and understates the role of territorial integrity. *Montana* was the product of several factors, including the nature of the regulation in question and the application of that regulation to fee land. It fully recognized that non-Indians and nonmembers of a tribe can affect the political integrity,

economic security, health and welfare of a tribe under the proper circumstances. The Montana Court's establishment of two tribal jurisdiction "exceptions" and its refusal to wholly extend its holding in *Oliphant*¹ to civil jurisdiction demonstrates the Court's cognizance of the influence of non-Indians and tribal real estate on tribal self-government.

One of the strongest interests that the tribe advances in this case is its interest in providing a forum for this plaintiff. And, the question of North Dakota state court jurisdiction is not as clear-cut as the court suggests. In fact, such jurisdiction is doubtful.

Two important points are relevant to this issue. First, Public Law 280, 28 U.S.C. § 1360, does not, for reasons other than those advanced by the court, have any bearing on this issue. In footnote 6, *supra* at 19, the court explains that 28 U.S.C. § 1360 applies only to actions to which Indians are parties. The original Public Law 280, however, applied to *all* "civil causes of action." See Act of Aug. 15, 1953, Pub. L. 280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360); see also Felix S. Cohen, *Handbook of Federal Indian Law* 362-63 (1982 ed.). Under the original Act, assumption of jurisdiction was mandatory for some states and optional for others, including North Dakota. It was not until 1968, when amendments to Public Law 280 were enacted, that state assumption of jurisdiction was limited to actions to which Indians were parties, subject to tribal

¹ In *Oliphant*, the Court held that tribal courts could not validly assert criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

consent. North Dakota had chosen to assume civil jurisdiction before the amendments were adopted,² but had voluntarily conditioned its jurisdiction upon consent of the tribes. N.D. Cent. Code § 27-19-01 (1991). The tribes of the Fort Berthold reservation did not consent. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g I*, 467 U.S. 138 (1984). Thus, North Dakota has no jurisdiction over the Fort Berthold reservation under 28 U.S.C. § 1360.

My second point is more relevant to the question of the authority of a state court to assume jurisdiction over a cause of action arising on an Indian reservation. Even absent jurisdiction conferred by federal statute, state courts may exercise jurisdiction over some civil causes of action arising on reservation lands. The scope of state court jurisdiction is limited by the *Williams v. Lee* "infringement" test: "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. State court jurisdiction cannot be disclaimed, at least where there is no other forum in which to bring an action. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g II*, 476 U.S. 877 (1986).

Thus, the question of whether a North Dakota state court can provide a forum for Mrs. Fredericks depends upon whether state jurisdiction in this instance would

² As Felix Cohen explains, although the amendments altered any prospective assumption of Public Law 280 jurisdiction, it preserved all jurisdiction previously acquired under the Act. Cohen, 363 n.126.

infringe upon the tribe's right to self government. Commentators seem to agree that state courts have subject matter jurisdiction over suits by non-Indians against non-Indians, even when the claim arises in Indian Country, so long as Indian interests are not affected. *See, e.g.,* Cohen, 352 ("The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases."); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country* 1990, 16 Am. Indian L. Rev. 319, 346 (1991).

The Three Affiliated Tribes have, however, adopted a tribal code which outlines civil court jurisdiction within the exterior boundaries of the reservation and which, in the absence of federal law to the contrary, imposes tribal law and custom, not North Dakota statute or common law, as controlling precedent for torts occurring within the reservation. *See* Tribal Code of the Three Affiliated Tribes of the Fort Berthold Reservation Ch. 1, § 2 (1980); *see also* Cohen 334-35.

Thus, in this case, state court jurisdiction would infringe upon the tribe's right of self government including the right to provide a forum, indeed the only forum, available to this resident of the reservation. The accident occurred on Indian land over which the tribe asserts territorial sovereignty and involved a non-Indian truck driver brought onto the reservation by a commercial contract between the tribe and his employer. Even though Mrs. Fredericks was a non-Indian, she had long resided on the reservation with a tribal member spouse (now

deceased) and is the mother of adult children who are enrolled members of the tribe. Had either accident participant been an Indian, the situs of the accident on the reservation would have clearly dictated tribal court jurisdiction as established in *Brendale*, *Iowa Mutual*, *National Farmers Union* and *Montana*. The tribal court has jurisdiction over Mrs. Fredericks' claim. I dissent from the court's ruling to the contrary.

FLOYD R. GIBSON, Circuit Judge, with whom McMILLIAN, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I agree with Judge McMillian's and Judge Beam's dissents. I write separately to express my dismay at this Court's unduly narrow view of "limited sovereignty." The type of "limited sovereignty" allotted by this Court to the tribe is, in fact, no real sovereignty at all.

Whether framed in terms of inherent tribal sovereignty under *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), or tribal interests under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), the power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power. As Chief Justice Marshall observed:

No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821). This case does not present an extraordinary occurrence. As the majority opinion notes, this case involves "an ordinary run-of-the-mill automobile accident." *Ante* at 18. The majority opinion today denies the tribe the ability to adjudicate the type of basic disputes that occur daily within Indian territory unless these disputes involve tribal members. Such a restriction interferes with the tribe's ability to manage its affairs by compromising its ability to deal with non-tribe members who happen to wreak havoc on tribal land.

I believe that the analysis and underlying rationale set forth in *Montana* have no relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians. 450 U.S. at 557-67. As such, I would limit the rule of that case to its facts and rely instead on the broad scope of inherent tribal sovereignty outlined in cases such as *Iowa Mutual*, 480 U.S. at 18.¹

Even if I were convinced that the reach of *Montana* is as broad as the majority of this Court believes it to be, I believe that this case implicates tribal interests and, as

¹ Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact.

Citations and quotation omitted.

such, falls squarely under either of the two *Montana* exceptions. I believe that this case meets the "consensual relationship" test under the first *Montana* exception because it arose as a direct result of A-1's consensual commercial contacts with the tribe. See 450 U.S. at 565-66. Had A-1 not subcontracted with LCM Corporation, a corporation wholly owned by the tribe, to perform construction work on a tribal community building within the boundaries of the reservation, the accident would never have occurred. The majority claims that there is "no proof (as opposed to allegations) . . . to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident." *Ante* at 3, note 1. I, however, fail to see any other plausible explanation as to why a gravel truck owned by A-1, a non-Indian-owned company, was on tribal land at the time of the collision. Because I believe that the accident clearly arose as the result of A-1's consensual relationship with the tribe and its members, I believe that the tribe retains the inherent sovereign power to exercise civil jurisdiction over A-1 under the first *Montana* exception.

I also believe that the tribe retains the inherent power to exercise civil authority over A-1 under the second *Montana* exception because A-1's conduct on tribal land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The majority dismisses the tribal interests at stake here as a "desire to assert and protect excessively claimed sovereignty." *Ante* at 19. As previously observed, however, the ability of a sovereign, even a limited sovereign, to adjudicate the everyday affairs and accidents occurring within its borders and provide a

forum for its citizens is one of the most basic and indispensable aspects of sovereignty. Aside from the threat to the tribe's political integrity, the majority opinion also unfairly discounts the effect of A-1's conduct on the health and welfare of the tribe. *Ante* at 18-20. While the immediate victim of the collision, Gisela Fredericks, is not a member of the tribe, she is nonetheless a longtime resident of the reservation whose husband and adult children are enrolled tribal members. To claim that A-1's conduct on tribal land had no effect on the health or welfare of the tribe is simply unrealistic and not in accordance with the facts.

For the aforementioned reasons, I would affirm the order of the district court.

McMILLIAN, Circuit Judge, with whom FLOYD R. GIBSON, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I join in Judge Beam's opinion concurring in part and dissenting in part, particularly the emphasis on the importance of geography or territory in analyzing issues of tribal sovereignty. I write separately to set forth the reasons why I would hold that the federal district court, and the tribal courts, correctly decided that the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

There are no disputed issues of fact relevant to the jurisdiction issue. None of the parties are tribal members. Gisela Fredericks is a resident of the reservation; the truck driver, Lyle Stockert, and his employer, A-1 Contractors, are not residents, but A-1 was performing work on the reservation under a subcontract agreement with

LCM Corp., a corporation wholly owned by the tribe, in connection with the construction of a tribal community building. Because the accident occurred within the exterior boundaries of the reservation, on a state highway right-of-way,¹ the cause of action arose on the reservation. The tribal code establishes personal and subject matter jurisdiction and applies tribal law and custom.

The legal issue presented, tribal court civil jurisdiction, is a question of federal law subject to de novo review. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). The jurisdiction issue is properly presented for determination on the merits. Tribal remedies have been exhausted, and we have the benefit of the tribal trial and appellate courts' opinions as well as that of the federal district court.

I would hold the tribal court has civil jurisdiction because of the presumption in favor of inherent tribal sovereignty, *Montana* applies only to issues involving fee lands, *Iowa Mutue!* establishes more than a rule of exhaustion of tribal remedies, the Handbook of Federal Indian Law does not definitively resolve the issue, and

¹ Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the [Supreme] Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

state court jurisdiction does not preclude tribal court jurisdiction. Finally, I would hold that even if *Montana* applies, providing a forum for reservation-based tort actions, even where the parties are non-Indian, falls within both *Montana* exceptions.

INHERENT TRIBAL SOVEREIGNTY

The majority opinion would not extend inherent tribal sovereignty over the activities of non-members, absent consent or some direct effect on the tribe. I remain convinced that the opposite presumption applies, that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (*Iowa Mutual*). See *Hinshaw v. Mahler*, 42 F.3d 1178, 1180-81 (9th Cir.) (tribal court jurisdiction over action brought by tribal member on behalf of non-tribal member child against non-tribal member arising out of car accident on reservation), *cert. denied*, 115 S. Ct. 485 (1994).

Indian tribes possess "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted), citing Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.). The Supreme Court has repeatedly emphasized that "there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (pre-emption of state authority over non-Indians acting on tribal reservations). See generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The*

Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1 (1993). Thus, "Indian tribes retain 'attributes of sovereignty over both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual*, 480 U.S. at 14, citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323 (emphasis added). Implicit divestiture of inherent sovereignty has been found necessary only

where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980) (footnote omitted).

The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them."

Iowa Mutual, 480 U.S. at 14, citing *Williams v. Lee*, 358 U.S. 217, 220 (1959). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

There is no ground for divestiture of inherent tribal sovereignty in the present case. No specific treaty provision or federal statute has been shown to affirmatively limit the power of the tribal courts of the Three Affiliated Tribes over civil actions that arise on the reservation, and the exercise of tribal civil jurisdiction over a tort action arising on the reservation between non-members does not implicate foreign relations, alienation of land, or the criminal prosecution of non-Indians.

STATUS OF LANDS AT ISSUE

First, *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*), and *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993) (*Bourland*), are not controlling. *Montana* and *Brendale* involved attempts by the tribes to regulate the activities of non-members on fee land, that is, land owned by non-members within the reservation; *Bourland* involved lands taken by the federal government for the construction of a dam and reservoir. The distinction between land conveyed in fee to non-Indians pursuant to the Indian General Allotment Act of 1887, 24 Stat. 388, which was intended to eliminate the reservations and assimilate the Indian peoples, or, in

Bourland, land taken by the federal government, and land owned by the tribe or trust land held by the federal government in trust for the tribe or individual members of the tribe, is fundamental to the analysis in *Montana*, *Brendale* and *Bourland*. The present case does not involve fee land or land taken by the federal government for public use. For that reason, I would apply *Montana*, and its exceptions, only to fee lands owned by non-tribal members.

A close reading of Justice Stewart's opinion for the Court in *Montana* demonstrates the importance of geographical or territorial status of the land at issue to tribal sovereignty analysis. The Court's analysis differentiated between fee lands and lands owned by the tribe or held in trust for the tribe. The competing regulatory authorities were the tribe and the state, each of which asserted the authority to regulate hunting and fishing by non-members within the reservation. The Court framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547 (emphasis added), 557. The Supreme Court held that the tribe could prohibit non-members from hunting or fishing on land owned by the tribe or trust land, *id.* at 557, and, if the tribe permitted non-members to fish or hunt on such lands, could condition their entry by charging a fee or establishing bag and creel limits. *Id.* However, the Court held inherent tribal sovereignty over the reservation did not extend to tribal regulation of non-Indian fishing and hunting on reservation land owned in fee by non-members. *Id.* at 564-65. The

Court admitted that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565 (emphasis added). The first *Montana* exception recognizes tribal regulatory authority over non-members who enter consensual relationships with the tribe or its members. *Id.* The second *Montana* exception expressly recognizes a tribe's "inherent power to exercise over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* (emphasis added). If inherent tribal sovereignty can include civil jurisdiction over non-Indians on fee lands within the reservation, it should include civil jurisdiction over non-Indians on tribal land or trust land within the reservation. This is because tribal civil jurisdiction is more restricted on fee land than on tribal or trust land.

Brendale also involved fee lands within the reservation; the competing regulatory authorities were once again the tribe and the state (or, more precisely, one county). The issue presented was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The tribal zoning ordinance applied to all lands located within the reservation, part of which was located in Yakima County. The county zoning ordinance applied to all lands located within the county, except for tribal trust lands. Most of the reservation was tribal trust land, referred to as the "closed area"; the rest

was fee land located through out the reservation in a checkerboard pattern but mostly in one part of the reservation, referred to as the "open area." The county had approved two proposed developments, one in the open area and one in the closed area, on fee lands owned by non-members of the tribe, that conflicted with the tribal zoning ordinance. The tribe sued to stop the proposed development and challenged the county's zoning authority over the reservation.

The judgment of the Court was divided. The Court, in an opinion by Justice White, upheld application of the county zoning ordinance to the fee land located within the open area, under both the treaty language, *id.* at 422-25, and the *Montana* inherent tribal sovereignty analysis. *Id.* at 425-32. However, the Court, in an opinion by Justice Stevens, upheld application of the tribal zoning ordinance to the fee land located within the closed area. *Id.* at 433-47 (differentiating between "essential character" of closed and open areas and noting open area was at least half-owned by non-members, had lost its character as an exclusive tribal resource, and, as practical matter, had become integrated part of county that is not economically or culturally delimited by reservation boundaries). Although the opinions reach different decisions for different reasons, it is important to note that the regulatory dispute involved the authority to control development of fee lands and not land owned by the tribe or held in trust for the tribe. *Cf. United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the

land"). Justice Blackmun would have upheld the tribe's exclusive authority to zone reservation land, including fee lands, and thus concurred in part and dissented in part. *Id.* at 448-68.

In *Bourland* the competing regulatory authorities were once again the tribe and the state. At issue were not fee lands, however, but former trust and fee lands that had been taken by the United States for construction of a dam and reservoir for flood control. The taking authorization also "opened" the taken land for recreational use, including hunting and fishing, by the public at large. As in *Montana*, the tribe sought to regulate hunting and fishing by non-members on the reservation, including the land taken for the flood control project. The state filed suit to enjoin the tribe from excluding non-Indians from hunting and fishing on the taken lands within the reservation. The Court, in an opinion by Justice Thomas, held that Congress, in enacting the flood control legislation, had abrogated the tribe's right under the relevant treaty to exclude non-Indians from the taken lands. 113 S. Ct. at 2316. The Court also held that inherent tribal sovereignty did not enable the tribe to regulate non-Indian hunting and fishing in the taken area in the absence of any evidence in the relevant treaties or statutes that Congress intended to allow the tribe to assert such regulatory jurisdiction. *Id.* at 2319-20. The Court, however, remanded the case for further consideration of whether the tribe retained the inherent sovereignty to regulate non-Indian hunting and fishing in the taken area under the two *Montana* exceptions. *Id.* at 2320. Justice Blackmun dissented and would have held that the tribe had the authority to regulate non-Indian hunting and fishing in

the taken area because the relevant statutes did not affirmatively abrogate either the tribe's treaty rights or inherent tribal sovereignty. *Id.* at 2323-24.

EXHAUSTION OF TRIBAL REMEDIES

Next, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers Union*), and *Iowa Mutual* do not establish only a rule of exhaustion requiring tribal courts to determine their jurisdiction in the first instance. The rule of exhaustion established in *National Farmers Union* is premised upon the Court's decision that tribal civil jurisdiction over non-Indians is not automatically foreclosed by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding federal legislation conferring jurisdiction on federal courts to try non-Indians for offenses committed in Indian country had implicitly pre-empted tribal criminal jurisdiction over non-Indians). *National Farmers Union* recognized that an exhaustion requirement would have been superfluous if there were no possibility of tribal civil jurisdiction over non-Indians. 471 U.S. at 854 (because if *Oliphant* applied, federal courts would always be the only forums for civil actions against non-Indians). *National Farmers Union* thus did not foreclose tribal court jurisdiction over a civil dispute involving a non-Indian defendant. *Id.* at 855 (school district defendant). *Iowa Mutual* not only reaffirmed the rule of exhaustion established in *National Farmers Union* but also expressly stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision

or federal statute." 480 U.S. at 18; see *Brendale*, 492 U.S. at 454-55 n.5 (Blackmun, J., concurring in part and dissenting in part). This is an affirmative recognition that tribal court civil jurisdiction over reservation-based tort actions against non-Indians is part of inherent tribal sovereignty. Otherwise, there would be no point in requiring exhaustion of tribal remedies to permit the tribal courts to evaluate the factual and legal bases of any challenges to their jurisdiction because the tribal courts would never have jurisdiction.

HANDBOOK OF FEDERAL INDIAN LAW

The landmark treatise does not definitively resolve this issue. As noted by the majority opinion, Felix S. Cohen's *Handbook of Federal Indian Law* 342-43 (1982 ed.) does state that "[t]ribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." However, another section of the Handbook supports tribal civil jurisdiction over non-Indians:

Indian tribes retain civil regulatory and judicial jurisdiction over non-Indians. The extent of tribal civil jurisdiction over non-Indians, however, is not fully determined.

Analysis of the actions of each of the three federal branches demonstrates that civil jurisdiction over non-Indians has not been withdrawn and that the exercise of such jurisdiction is consistent with the tribes' dependent status under federal law. . . . In the civil field [contrary to the rule in criminal matters], Congress has

never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians. Congress' failure to regulate civil jurisdiction in Indian country suggests both that there was no jurisdictional vacuum to fill and that Congress was less concerned with tribal civil, non-penal jurisdiction over non-Indians than with tribal jurisdiction over the personal liberty of non-Indians.

The executive branch of the federal government has long acted on the assumption that Indian tribes may subject non-Indians to civil jurisdiction. Although the Attorney General and the Solicitor of the Department of the Interior have opined since 1834 that Indian tribes lack criminal jurisdiction over non-Indians, several opinions have upheld tribal civil jurisdiction. The Attorney General sustained tribal civil jurisdiction in 1855. A comprehensive 1934 Opinion of the Solicitor of the Department of the Interior concluded that "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." . . .

. . . .

The breadth of [the tribes'] retained power over non-Indians in civil matters has not been finally resolved. . . .

. . . .

A tribe presumptively has an interest in activities on lands belonging to the tribe or its members, so tribal control over Indian trust land can be the basis for extensive tribal jurisdiction over non-Indians in civil matters. Regardless of land ownership, tribal jurisdiction within reservations can also be based on transactions between non-Indians and Indians or tribes or on non-Indian activities that directly affect Indians or their property.

Id. at 253-57 (footnotes omitted). Neither excerpt definitively resolves the issue of tribal court jurisdiction over a civil suit brought against a non-Indian arising from a tort occurring on the reservation.

STATE COURT JURISDICTION

The possibility of state court jurisdiction does not preclude tribal court jurisdiction. *See Hinshaw v. Mahler*, 42 F.3d at 1180 (concurrent state and tribal jurisdiction over certain civil matters occurring on Flathead Reservation, including operation of motor vehicles on public roads), *citing Larivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563, 566-71 (1979) (same), *cert. denied*, 445 U.S. 964 (1980). However, tribal court jurisdiction may preclude state court jurisdiction, particularly where the tribe has established tribal courts and adopted a tribal code which provides for personal jurisdiction over non-Indians, subject matter jurisdiction over torts arising on the reservation,

and application of tribal law. This is particularly true if one views the issue in terms of a state's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually denied, *see e.g., Williams v. Lee*, 358 U.S. 217, as opposed to a tribe's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually upheld. *See, e.g., City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993) (reserving inherent tribal sovereignty issue), *cert. denied*, 114 S. Ct. 2741 (1994). For example, in the landmark case of *Williams v. Lee* the Court held that the state court did not have jurisdiction over an action brought by a non-Indian who operated a general store on a reservation to recover money for goods sold to Indians because "the exercise of state jurisdiction [under the circumstances] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223; *cf. Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1341 (D.S.D. 1975) (upholding tribal court jurisdiction over tribe's suit against non-Indian lessee of tribal land).

TRIBAL SELF-GOVERNMENT

Finally, even assuming for purposes of analysis that *Montana* is not limited to disputes involving fee lands, a "consensual relationship" existed between A-1 and Stockert and the tribe by virtue of the subcontract within the meaning of the first *Montana* exception. In addition, the allegedly tortious conduct of A-1 and Stockert occurred on a state highway right-of-way on the reservation. This conduct by non-Indians within the reservation threatened

the tribe's interest in the safe operation of motor vehicles on the roads and highways on the reservation. See *Hinshaw v. Mahler*, 42 F.3d at 1180; cf. *Sage v. Lodge Grass School District No. 27*, 13 Indian L. Rep. 6035, 6039 (Crow Ct. App. 1986) (remand following *National Farmers Union*; student hit by motorcycle on school parking lot; tribe has legitimate interest in protecting health and safety of school children attending school within reservation). The tribe also has an interest in affording those who have been injured on the reservation with a judicial forum. This interest is admittedly abstract compared to the safe operation of motor vehicles. However, disregarding the jurisdiction of tribal courts, which play a vital role in tribal self-government, undermines their authority over reservation affairs and to that extent imperils the political integrity of the tribe.

For these reasons, I would affirm the order of the district court holding the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

PETITIONER'S BRIEF

QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the rule of *Montana v. United States*, 450 U.S. 544 (1981), that the inherent sovereign civil regulatory jurisdiction of Indian tribes over the activities of non-Indians has been generally divested as to lands alienated from Indian title by Congress, to a question of tribal adjudicatory jurisdiction over a civil tort action between two non-Indians arising on a state highway crossing Indian trust land within an Indian reservation, rather than applying the rule of *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), that Tribes have retained their civil jurisdiction over non-Indian conduct on Indian land unless that jurisdiction has been expressly limited by Congress?

2. Assuming *arguendo* that the *Montana* rule applies, does the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation nevertheless have civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the Tribe, against a non-Indian contractor that had a subcontract with the Tribe's corporation to perform work on the Reservation, to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing Indian trust land on the Reservation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. Proceedings in the Tribal Courts and in the Federal District Court	4
C. Proceedings in the United States Court of Appeals for the Eighth Circuit	5
1. The Three Judge Panel	5
2. The <i>En Banc</i> Court	6
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE TRIBE'S INHERENT SOVEREIGNTY GIVES IT JURISDICTION OVER THIS CIVIL COURT ACTION ARISING BETWEEN TWO NON-INDIANS ON INDIAN LAND	8
A. The Tribe retains sovereignty over conduct occurring within its territory unless divested of such authority by Congress	8

TABLE OF CONTENTS - Continued

	Page
B. <i>Williams v. Lee, Merrion, National Farmers Union, and Iowa Mutual</i> establish that Congress has not generally divested tribal civil jurisdiction over the conduct of non-Indians on Indian land	11
C. <i>Montana, Brendale, and Bourland</i> are consistent with a finding of tribal jurisdiction in this case because those cases involved congressional divestment of tribal jurisdiction	15
D. 25 U.S.C. § 323, under which the State was granted an easement to improve and maintain a highway across Indian trust land within the Reservation, does not divest the Tribe of its civil jurisdiction over the activities of non-Indians on the highway	19
1. Since the highway remains Indian land, the Tribe retains jurisdiction over non-Indian activities on the highway	19
2. Even assuming <i>arguendo</i> that the right-of-way for Highway 8 takes the highway out of the category of Indian land, tribal adjudicatory jurisdiction remains	22
a. The presumption of tribal civil adjudicatory jurisdiction applies even where Indian title has been alienated	23
b. The existence of tribal court jurisdiction concurrent with the state courts does not pose the compliance problems of conflicting regulatory schemes	24

TABLE OF CONTENTS – Continued

	Page
II. ASSUMING <i>ARGUENDO</i> THAT THE MONTANA RULE APPLIES, THERE IS A CONSENSUAL RELATIONSHIP AND / OR A DIRECT EFFECT IN THIS CASE SUFFICIENT FOR THE TRIBE TO EXERCISE ADJUDICATORY JURISDICTION	26
A. <i>Montana</i> contemplates that reasonably foreseeable acts stemming from a consensual relationship will be subject to tribal jurisdiction	26
B. A-1's tortious conduct against a community member on the Reservation threatens the Tribe's economic security and political integrity	28
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
CASES	
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980)	23
<i>Brendale v. Confederated Tribes and Bands</i> , 492 U.S. 408 (1989)	7, 15, 17, 18, 24, 29
<i>Bruce H. Lien Co. v. Three Affiliated Tribes</i> , 93 F.3d 1412 (8th Cir. 1996)	3
<i>Burlington Northern R.R. Co. v. Blackfeet Tribe</i> , 924 F.2d 899 (9th Cir. 1991), <i>cert. denied</i> , 505 U.S. 1212 (1992)	7, 21, 22
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989)	25
<i>Crider v. Zurich Insurance Co.</i> , 380 U.S. 39 (1965)	29
<i>Davis v. Director, North Dakota Department of Transport</i> , 467 N.W.2d 420 (N.D. 1991)	21
<i>Delaware Tribal Business Committee v. Weeks</i> , 430 U.S. 73 (1977)	29
<i>Diamond Ring Trucking and Excavating v. Dawson</i> , Civ. No. 11-94-A04-461A (Ft. Berth. Tr. Ct. 1995)	26
<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	9, 14, 15
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990), <i>cert. denied</i> , 499 U.S. 943 (1991)	28
<i>Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.</i> , 462 N.W.2d 164 (N.D. 1990)	25
<i>Gulf Offshore Co. v. Mobil Oil Corp.</i> , 453 U.S. 473 (1981)	24
<i>Hinshaw v. Mahler</i> , 42 F.3d 1178 (9th Cir. 1994), <i>cert. denied</i> , 115 S.Ct. 485 (1994)	13, 14, 22

TABLE OF AUTHORITIES – Continued

	Page
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	<i>passim</i>
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984).....	30
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	6, 10, 12, 17, 18, 29
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
<i>Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana</i> , 472 U.S. 237 (1985)	21
<i>National Farmers Union Insurance Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985).....	<i>passim</i>
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983).....	6, 12, 16, 17, 25
<i>North Valley Water Association v. Northern Improvement Co.</i> , 415 N.W.2d 492 (N.D. 1987)	25
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).....	8, 13, 27
<i>Preseault v. I.C.C.</i> , 494 U.S. 1 (1990).....	21
<i>Quackenbush v. Allstate Insurance Co.</i> , ___ U.S. ___, 116 S. Ct. 1712 (1996)	25
<i>Raaum v. Powers</i> , 396 N.W.2d 306 (N.D. 1986).....	25
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983).....	9
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	7, 9, 14, 26
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993).....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Three Affiliated Tribes v. Wold Engineering</i> , 476 U.S. 877 (1986).....	25
<i>U.S. ex rel. Morongo Band of Mission Indians v. Rose</i> , 34 F.3d 901 (9th Cir. 1994).....	18
<i>United States v. Finch</i> , 548 F.2d 822 (9th Cir. 1976), <i>vacated</i> , 433 U.S. 676 (1977).....	16
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983).....	21
<i>United States v. Montana</i> , 604 F.2d 1162 (9th Cir. 1979)	16
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	9
<i>Washington v. Confederated Tribes</i> , 447 U.S. 134 (1980).....	9, 12, 18, 25
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980).....	11
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	<i>passim</i>
<i>Yellow Freight System, Inc. v. Donnelly</i> , 494 U.S. 820 (1990).....	24
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996).....	14, 22
CONSTITUTIONS, TREATIES, STATUTES AND CODES	
Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749	2
16 U.S.C. § 457.....	24
18 U.S.C. § 1151.....	2, 11, 22
25 U.S.C. § 311.....	20
25 U.S.C. §§ 323-328.....	1, 3, 19, 20

TABLE OF AUTHORITIES - Continued

Page

25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381	11, 16
25 U.S.C. §§ 396a-396g	12
25 U.S.C. §§ 450-450n	3
25 U.S.C. §§ 461-479	2
25 U.S.C. §§ 1301-1303	14, 26
25 U.S.C. § 1322	12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	4, 26
28 U.S.C. § 1332	13
45 U.S.C. § 56	23
Act of March 3, 1901, 31 Stat. 1083	20
Act of Feb. 5, 1948, 62 Stat. 17	3
Flood Control Act of 1944, 58 Stat. 887	18
Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191	18
Const. and By-Laws of the Three Affiliated Tribes, Art. IV, Sec. 3	3
Code of Laws of the Three Affiliated Tribes, Chaps. 1, 4-A, 28	3, 22, 26

LEGISLATIVE MATERIALS

S. Rep. No. 823, 80th Congr., 2nd Sess. (1948)	20
--	----

TABLE OF AUTHORITIES - Continued

Page

ADMINISTRATIVE MATERIALS

United States Department of Commerce, Bureau of The Census, 1990 Census of Population	3
25 C.F.R. Part 169	20, 21

COURT RULES

N.D. S.Ct. Rule 7.2	25
---------------------------	----

MISCELLANEOUS

Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	9, 10, 15
Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, <i>The Law of Property</i> (2d ed. 1993)	21
L. Scott Gould, <i>The Consent Paradigm: Tribal Sover- eignty at the Millennium</i> , 96 Colum. L. Rev. 809 (1996)	11
Judge Robert E. Keeton, <i>Part I: The Changing Lives of Professionals in Law</i> , 37 Ariz. L. Rev. 419 (1995)	29

OPINIONS BELOW

The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals for the Eighth Circuit, entered February 16, 1996, are reported at 76 F.3d 930, and reprinted in the Joint Appendix, J.A. 91-138. The order of the Court of Appeals granting rehearing *en banc* entered on January 9, 1995 is reprinted in the Appendix to the Petition for *Certiorari* at page 49. The opinion and dissenting opinion of the three judge panel of the Court of Appeals, entered November 29, 1994 and vacated by the granting of rehearing *en banc*, are reprinted at J.A. 68-90. The District Court's memorandum and order, entered September 16, 1992, are unpublished and reprinted at J.A. 54-67. The memorandum opinion of the Northern Plains Intertribal Court of Appeals, dated January 8, 1992 is unpublished and reprinted at J.A. 26-37. The opinion and order of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, filed on September 4, 1991, is unpublished and reprinted at J.A. 19-25.

JURISDICTION

Rehearing *en banc* by the Court of Appeals for the Eighth Circuit was granted by order of January 9, 1995. The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals were entered on February 16, 1996. A petition for a writ of *certiorari* was filed with this Court on May 16, 1996, within 90 days of February 16, 1996. This Court granted the petition by order dated October 1, 1996.

This Court has jurisdiction to review the final *en banc* judgment of the Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out verbatim as follows:

A. 25 U.S.C. § 323. Rights-of-way for all purposes across any Indian lands:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

B. 18 U.S.C. § 1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

A. Introduction

The Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) of the Fort Berthold Indian Reservation are a federally-recognized Indian tribe (the Tribe) which exercises its sovereignty under a constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, and approved by the Secretary of the Interior. The Tribe is located on the Fort Berthold Indian Reservation (the Reservation) in west central North Dakota pursuant to the Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749, with the United States. The population of the Reservation includes 2,999 enrolled tribal members and 2,458 nonmembers, of whom

2,396 are non-Indians. United States Department of Commerce, Bureau of the Census, 1990 Census of Population.

Pursuant to its Constitution, the Tribe has established a Tribal Court as the judicial branch of its government. Const. and By-Laws of the Three Affiliated Tribes, Art. IV, Sec. 3. The Tribal Court is funded primarily under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, and is supplemented by tribal funds. The Tribal Court operates pursuant to a written code of laws adopted by the Tribe and approved by the Secretary of the Interior. Code of Laws of the Three Affiliated Tribes, Chap. 1, Secs. 1-3.6 (Tribal Business Council Resolution 82-192, Oct. 22, 1982). Appeals may be taken from the Tribal Court to the Northern Plains Intertribal Court of Appeals, which also receives federal funding under the Indian Self-Determination and Education Assistance Act. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1416 n.7 (8th Cir. 1996).

On November 9, 1990, there was a two-vehicle accident on North Dakota Highway 8 within the exterior boundaries of the Reservation near the small community of Twin Buttes. Highway 8 enters the southern boundary of the Reservation several miles south of Twin Buttes. The authority for Highway 8 to enter the Reservation is an easement granted by the Bureau of Indian Affairs to the North Dakota Highway Department on May 8, 1970 pursuant to 25 U.S.C. §§ 323-328, Act of Feb. 5, 1948, 62 Stat. 17. On the Reservation, Highway 8 crosses 6.59 miles of Indian trust land before it ends at the shores of Lake Sakakawea. Highway 8 does not cross any non-trust land within the Reservation.

The drivers of the vehicles in the accident, Gisela Fredericks and Lyle Stockert, are both non-Indians. Gisela Fredericks is a long-time Reservation resident, the widow of tribal member Kenneth Fredericks, and the mother of five adult children who are tribal members. Lyle Stockert is an employee and part owner of A-1 Contractors, a non-Indian subcontracting company located off the Reservation. Gisela Fredericks was seriously injured in the accident and was hospitalized for twenty-four days.

At the time of the accident, Lyle Stockert was driving a company gravel truck. A-1 Contractors previously had entered into a \$12,490 subcontract on the Reservation with LCM Corporation, an entity wholly owned by the Tribe. Under the subcontract, A-1 Contractors did excavating, berming, and recompacting in connection with the construction of the Twin Buttes tribal community center. All of A-1 Contractors' work under the subcontract was performed within the boundaries of the Reservation.

B. Proceedings in the Tribal Courts and in the Federal District Court

Mrs. Fredericks and her five adult children (hereinafter collectively referred to as "the Fredericks"), sued Lyle Stockert and A-1 Contractors (hereinafter collectively referred to as "A-1")¹ in Tribal Court for damages for injuries allegedly sustained in the accident as a result of their negligence. Mrs. Fredericks sought \$1,000,000 for her personal injuries and medical expenses. Her children sought \$1,000,000 for loss of consortium (J.A. 5-10).

A-1 moved to dismiss the action for lack of jurisdiction under federal law (J.A. 11-18). The Tribal Court held that it had jurisdiction under federal law over Mrs. Fredericks' action.² The Northern Plains Intertribal Court of Appeals affirmed and remanded the case to the Tribal Court for further proceedings (J.A. 26-37). No further proceedings have occurred against A-1 in this case in Tribal Court since the remand.

Under 28 U.S.C. § 1331, A-1 sought declaratory and injunctive relief from tribal jurisdiction in the federal district

¹ Also named, but later dismissed, was Continental Western Insurance Company, A-1's insurer on the subcontract activities (J.A. 38-40). A punitive damages claim was dismissed when the insurance company was dismissed.

² The Tribal Court expressly declined to reach or express any opinion as to its jurisdiction over the consortium claims by Mrs. Fredericks' children (J.A. 25). No other court has reached this issue in this litigation.

court for North Dakota (J.A. 41-45). In addition to the Fredericks, the Tribal Court and the Tribal Court Judge (hereinafter collectively referred to as "the Tribal Defendants") were named as defendants (J.A. 41-42). The Tribal Defendants waived their immunity and consented to suit for the limited purpose of defending the federal law claims against tribal jurisdiction in this case (J.A. 46-53).

On cross-motions for summary judgment, the Honorable Patrick A. Conmy denied A-1's motion and granted the Fredericks' and Tribal Defendants' motions (J.A. 54-67). The district court based its decision largely on this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

C. Proceedings in the United States Court of Appeals for the Eighth Circuit

1. The Three Judge Panel

A-1 appealed to the Court of Appeals for the Eighth Circuit.³ A three-judge panel ruled 2-1 in favor of tribal court jurisdiction over Mrs. Fredericks' action (J.A. 68-90). The majority opinion was authored by Judge McMillian and joined by Judge Floyd R. Gibson. The majority upheld tribal court jurisdiction under this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, and, alternatively, under this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). (J.A. 69-81). Judge Hansen dissented, on the grounds that *Iowa Mutual Ins. Co. v. LaPlante* is inapplicable to this case, and that tribal jurisdiction in the case is unsustainable under *Montana v. United States* (J.A. 81-90).

³ The issue of personal jurisdiction of the Tribal Court over A-1 was raised in and reached by the Tribal Court (J.A. 24), the Tribal Court of Appeals (J.A. 27), and the federal district court (J.A. 63). All of these courts found that the Tribal Court has personal jurisdiction over A-1. Before the Court of Appeals, A-1 raised only the issue of subject matter, not personal, jurisdiction (J.A. 92).

2. The *En Banc* Court

The *en banc* Court of Appeals ruled 8-4 against tribal court subject matter jurisdiction over Mrs. Fredericks' action (J.A. 91-138). Judge Hansen authored the majority opinion which was joined by Chief Judge Richard S. Arnold, and Judges Fagg, Bowman, Wollman, Magill, Loken, and Morris Shepard Arnold. The majority thought that *Iowa Mutual Ins. Co. v. LaPlante* is inapplicable to this case, and that tribal jurisdiction in the case is unsustainable under *Montana v. United States* (J.A. 91-114). Judges McMillian, Floyd R. Gibson, Beam, and Murphy dissented. Judge Beam wrote a concurring and dissenting opinion, in which he stated that he would uphold tribal jurisdiction in this case under *Montana v. United States*, (J.A. 114-121). Judges Gibson and McMillian wrote dissenting opinions, arguing that tribal jurisdiction should be upheld under both *Iowa Mutual Ins. Co. v. LaPlante* and *Montana v. United States* (J.A. 121-138). All four dissenting Judges joined each of the dissenting opinions.

The Tribe's and the Fredericks' Petition for a Writ of *Certiorari* to this Court followed on May 16, 1996.

SUMMARY OF ARGUMENT

I. The fundamental principle of Indian tribal sovereignty is that it is inherent. While it is subject to divestment by Congress, it continues unless and until it has been divested. A Tribe's sovereignty extends over its members and over its territory. Within its territory, a tribe's sovereignty encompasses the conduct of non-Indians as this Court has recognized in a variety of contexts. *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (taxation of oil and gas severance); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (regulation of hunting and fishing); *Williams v. Lee*, 358 U.S. 217 (1959) (civil tribal court cases brought by non-Indians against Indians); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (civil tribal court cases brought by Indians against non-Indians); *accord Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

This general rule is dispositive of this case. In those cases which have found against tribal civil jurisdiction over non-Indian activities, the Court has done so, consistent with the doctrine of inherent sovereignty, only after finding a congressional divestment of tribal sovereignty through the alienation of Indian land to non-Indians. *E.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (General Allotment Act); *Brendale v. Confederated Tribes and Bands*, 498 U.S. 408 (1989) (General Allotment Act); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Flood Control Project Acts).

The title to the land on which this case arose has not been alienated to non-Indians. Although the state maintains a highway over the land pursuant to an easement, the land remains Indian trust land. *See Burlington Northern R.R. Co. v. Blackfeet Tribe*, 904 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (absent express congressional provision otherwise, tribe retains beneficial title to land underlying railroad right-of-way).

But even if the easement affects the highway's status as Indian land, in the area of adjudicatory jurisdiction that does not amount to a congressional divestment of tribal sovereignty over non-Indian conduct. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (in a tribal court case arising on non-Indian fee land, the Court holds that tribal jurisdiction is not automatically foreclosed); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (in a tribal court case arising on a federal highway, the Court holds that tribal jurisdiction is presumptive). There are good reasons this is so. Adjudicatory jurisdiction is less intrusive than regulatory jurisdiction. In addition, adjudicatory jurisdiction can be concurrent with another sovereign whereas dual regulatory jurisdiction may create an unreconcilable conflict.

The proposition that a Tribe's court may hear a civil action involving two non-Indians when one of the non-Indians chooses to bring the case in tribal court is unremarkable. *Williams v. Lee*, 358 U.S. 217 (1959), makes clear that there is nothing inherently offensive about forcing non-Indians involved in civil disputes on Indian land to appear in tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978),

states that tribal courts are recognized as the fora for resolving reservation-based civil disputes involving non-Indians. *National Farmers* and *Iowa Mutual* show that tribal court jurisdiction over non-Indian defendants in the civil area, as opposed to the criminal area, see *Oliphant v. Suquamish Tribe*, 438 U.S. 191 (1978), is not inconsistent with overriding national interests.

II. Alternatively, assuming arguendo that the Tribe must meet the *Montana* "tribal interest test" to have jurisdiction over this case, the Tribe can show either a consensual relationship or a threat or effect on the Tribe sufficient to meet that test.

Regarding the consensual relationship, A-1 Contractors and its employee were on the Reservation pursuant to a subcontract with the Tribe's corporation to help build a tribal community center. *Montana* does not limit tribal jurisdiction to the "four corners" of the construction subcontract. Rather, consensual relationship jurisdiction under *Montana* encompasses reasonably foreseeable consequences of the subcontract, such as an injury accident involving the company gravel truck.

In addition, A-1's tortious conduct against a member of the Reservation community threatens the Tribe economically with respect to provision of services to injured community members and their families on the Reservation. Tortious conduct on the Reservation also threatens the Tribe politically with respect to determination of tort law on the Reservation.

ARGUMENT

I. THE TRIBE'S INHERENT SOVEREIGNTY GIVES IT JURISDICTION OVER THIS CIVIL COURT ACTION ARISING BETWEEN TWO NON-INDIANS ON INDIAN LAND

A. The Tribe retains sovereignty over conduct occurring within its territory unless divested of such authority by Congress

The fundamental principle of federal Indian law is that the sovereignty of Indian tribes is inherent and exists unless and until it has been divested by Congress.

The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978); accord *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("If this power is to be taken away from them, it is for Congress to do it"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").⁴

Absent congressional divestment, a tribe's inherent sovereignty extends to both its members and its territory. "We

⁴ "This Court has found implicit divestiture of inherent sovereignty necessary only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." " *South Dakota v. Bourland*, 508 U.S. 679, 699 (1993) (Souter, J., dissenting), citing *Washington v. Confederated Tribes*, 447 U.S. 134, 153-154 (1980); see also *Duro v. Reina*, 495 U.S. 676 (1990) (tribes lack criminal jurisdiction over Indians who are members of another tribe); cf. *Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation).

The present case, of course, involves tribal civil court jurisdiction, an area in which divestment must be congressional. E.g., *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("In the absence of any indication that Congress intended . . . to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion").

have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (*Iowa Mutual*) (citations omitted).

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), the seminal case on tribal taxation of non-Indian activities within a reservation, the Court concluded that:

"Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' " They "are unique aggregations possessing attributes of sovereignty over both their members and their territory."

... [T]he Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.

455 U.S. at 140-41 (citations omitted).

In upholding tribal court jurisdiction over a contract action that arose between a tribal member and a non-Indian on a reservation, the Court stated:

It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Williams v. Lee, 358 U.S. at 223 (citations omitted).

Largely due to now-discredited federal policies of the late nineteenth century such as allotment and sale of "surplus" Indian land, many Indian reservations have not remained closed territories. During the allotment era, acts of Congress opened these reservations to homesteaders and in some instances patented in fee simple substantial acreage within reservations to non-Indians. See generally Felix S. Cohen, *Handbook of Federal Indian Law*, 127-143 (1982 ed.).

Some of this land today remains owned by non-Indians. This Court takes into account the effects of the allotment scheme on tribal sovereignty and tribal territorial jurisdiction. See *Montana v. United States*, 450 U.S. 544, 561 (1981) (*Montana*) ("treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands" by Congress).

Despite the acts which opened up reservations and alienated land within them, "[t]he Court has repeatedly emphasized that there is a significant geographic component to tribal sovereignty. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); see also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 837 (1996) ("the historical presumption on which the doctrine of inherent sovereignty rest[s] . . . [is] that tribes have territorial sovereignty unless limited by treaty or acts of Congress").

B. *Williams v. Lee*, *Merrion*, *National Farmers Union*, and *Iowa Mutual* establish that Congress has not generally divested tribal civil jurisdiction over the conduct of non-Indians on Indian land⁵

Williams v. Lee, the landmark case upholding tribal civil jurisdiction over non-Indians on Indian land, was a lawsuit brought in state court by a non-Indian against a tribal member to collect a debt incurred on a reservation. 358 U.S. at 217-218. This Court recognized that Congress has not generally granted civil jurisdiction to the states over court cases involving non-Indians on Indian land. *Id.* at 218-222. The

⁵ In this Brief, the term "Indian land" refers to land in which the Tribe or tribal members have an interest. It does not include land owned in fee by non-Indians or other land alienated from Indian title by Congress. See 18 U.S.C. § 1151, as construed by this Court in accordance with other federal statutes, e.g., *Montana*, 450 U.S. at 557-566 (General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381, generally divests tribal jurisdiction to regulate non-Indian activities on non-Indian fee land within a reservation).

Court noted that Public Law 280, 25 U.S.C. § 1322, provides for limited state court jurisdiction over civil actions in Indian country, but Arizona had not taken advantage of that provision. 358 U.S. at 222-223. Since Congress had neither granted state jurisdiction nor divested tribal jurisdiction, the Court held that inherent and exclusive jurisdiction is in the tribal courts. *Id.* at 223; *cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (in challenge to state's authority to regulate the hunting and fishing of non-Indians on Indian land, Court holds that jurisdiction to regulate hunting and fishing by non-Indians on Indian land is exclusive with the tribe).

Williams v. Lee laid the foundation for a clear rule that tribes retain their inherent civil jurisdiction over the conduct of non-Indians on Indian land unless such jurisdiction has been expressly divested by Congress. Subsequent cases have sustained inherent tribal jurisdiction over non-Indian conduct on Indian land against arguments that a particular federal statute has divested tribal jurisdiction.

In *Merrion*, provisions of the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, and other federal energy legislation were alleged to have divested a tribe's inherent sovereignty to impose a severance tax on oil and gas development activities conducted by non-Indians on Indian land. 455 U.S. at 149-152. The Court disagreed that these statutes were "clear indications" of divestment and upheld the tribe's right to tax. *Id.* at 152;⁶ *cf. Washington v. Confederated Tribes*, 447 U.S. 134, 152 (1980) (tribes can tax cigarette purchases by nonmembers on Indian land because "federal law to date has not worked a divestiture of Indian taxing power").

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (*National Farmers*), presented a non-statutory challenge to the civil jurisdiction of a tribal court. In

⁶ The Court in *Merrion* explicitly based tribal taxing power not on the consent of the taxpayer, but on "the tribe's general authority, as sovereign, to control economic activity . . . and to defray the cost of providing governmental services . . ." 455 U.S. at 137, 147.

arguing against tribal court jurisdiction to hear a reservation-based tort claim against non-Indians, the non-Indians in *National Farmers* urged the Court to extend to civil cases the rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribal criminal powers over non-Indians have been generally and implicitly divested. The Court refused to do so.

In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction.

. . . . For several reasons, however, the reasoning of *Oliphant* does not apply to this case

. . . . [W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.

471 U.S. at 853-856.

In *Iowa Mutual*, the Court rejected the argument that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, divested tribal authority to adjudicate a civil tort case arising on a reservation and involving a non-Indian defendant.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."

480 U.S. at 18 (citations omitted).

The district court in this case thus correctly held that "[t]he law is clear that Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)." (J.A. 63); accord *Hinshaw v. Mahler*, 42 F.3d 1178,

1181 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 485 (1994) (upholding tribal court jurisdiction over tort claims brought by a tribal member against a non-Indian and arising out of an automobile accident on a federal highway running through an Indian reservation, because "[t]he Tribes' jurisdiction has not been limited by treaty or statute . . . "); *but cf. Yellowstone County v. Pease*, 96 F.3d 1169, 1175-1176 (9th Cir. 1996) (explaining *Hinshaw* as being decided under the *Montana* rule, not the *Iowa Mutual* rule).

The Court's treatment of tribal civil jurisdiction is vastly different than its treatment of tribal criminal jurisdiction.⁷ In *Oliphant* the Court expressed grave concerns about the tremendous potential infringement on personal liberty posed by criminal jurisdiction. 435 U.S. at 210-212. The same concerns led the Court in *Duro v. Reina*, 495 U.S. 676 (1990), to prohibit Indian tribes from trying and punishing Indians who are members of another tribe. 495 U.S. at 693-94.⁸

Williams v. Lee, however, makes clear that there is nothing inherently offensive about forcing non-Indians to appear in tribal court civil actions. 358 U.S. at 223. A unanimous Court in *National Farmers* rejected a general divestment rule for tribal civil court jurisdiction, 471 U.S. at 853-856. "Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted." *Iowa Mutual*, 480 U.S. at 15.

[O]ur decisions recognize broader retained tribal powers outside the criminal context. Tribal courts,

⁷ Congress likewise has placed greater restrictions on tribal authority in criminal cases than in civil cases. The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, confers habeas corpus jurisdiction on federal courts to review tribal incarcerations alleged to violate that Act, while the Act leaves tribal courts free from federal court review of civil cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 61-72.

⁸ *Duro* has since been overturned by Congress to clarify that tribes may exercise some criminal jurisdiction over members of other tribes. 25 U.S.C. § 1301(2)-(4), Pub L. 101-511, Nov. 5, 1990, 104 Stat. 1893.

for example, resolve civil disputes involving non-members, including non-Indians. . . . "The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction."

Duro v. Reina, 495 U.S. at 687-88, citing Felix S. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.). Clearly, the criminal cases do not alter the rule, hereinafter referred to as "the *Iowa Mutual* rule," that, absent divestment by Congress, tribes retain inherent civil jurisdiction over the conduct of non-Indians on Indian land.

C. *Montana*, *Brendale*, and *Bourland* are consistent with a finding of tribal jurisdiction in this case because those cases involved congressional divestment of tribal jurisdiction

Tribal jurisdiction in this case is consistent with *Montana* and its progeny, *Brendale v. Confederated Tribes and Bands*, 492 U.S. 408 (1989) (*Brendale*), and *South Dakota v. Bourland*, 508 U.S. 679 (1993) (*Bourland*). A-1 misreads these cases as creating a general rule of divestiture regarding tribal civil jurisdiction over non-Indian conduct anywhere on Indian reservations. In effect, A-1 argues that these cases overrule the *Iowa Mutual* rule cases. But there has been no such overruling, and a proper reading shows that *Montana*, *Brendale*, and *Bourland* turned on this Court's findings that relevant acts of Congress diminished the tribal civil regulatory jurisdiction over non-Indian activities on the non-Indian land involved in those cases.

For example, the tribal jurisdictional issue in *Montana* was regulation of hunting and fishing by non-Indians within a reservation. 450 U.S. at 557-566. At the outset the Court specifically separated the issue of the tribe's authority to regulate the activities of non-Indians on Indian land from the issue of tribal authority to regulate such activities on land owned in fee by non-Indians.

The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land

belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

450 U.S. at 557 (citations omitted).

The court of appeals in *Montana* had held that "the right of Indians to control hunting, trapping and fishing on their lands" through civil regulation was an inherent sovereign right confirmed in the tribe's treaties and undiminished by Congress. *United States v. Montana*, 604 F.2d 1162, 1166-1167 (9th Cir. 1979), citing *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977). This Court "readily agreed" with this holding. 450 U.S. at 557; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 344 (tribal authority to regulate non-Indian hunting and fishing on Indian land is exclusive of state authority).

On the separate issue in *Montana* of "the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe," this Court reversed the court of appeals. 450 U.S. at 557. The Court found that neither the tribe's inherent sovereignty nor its treaties supported tribal regulation of non-Indian hunting and fishing on the non-Indians' fee land in that case. *Id.* at 557-67. The Court determined that the General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381, effectuated a divestment of tribal sovereignty to regulate non-Indian hunting and fishing on land alienated to non-Indians. 450 U.S. at 559-560.

It is in this portion of *Montana* dealing with "lands no longer owned by the tribe," 450 U.S. at 564, that the Court articulates a rule, hereinafter referred to as "the *Montana* rule," that where Congress has alienated land from Indian

title, tribal jurisdiction to regulate the activities of non-Indians on such land remains only where the *Montana* "tribal interest test" is met. *Montana*, 450 U.S. at 565-566; see also *infra*, Part II of this Brief (discussing the tribal interest test). Subsequent cases of this Court clarify that application of the *Montana* rule turns on whether the activities sought to be regulated take place on Indian land or on non-Indian land.

For example, one term after *Montana*, the Court in *Merion* upheld tribal taxation of non-Indian activities conducted on Indian land without reference to the *Montana* rule. "The Tribe has the inherent power to impose the severance tax on petitioners. . . . Because Congress may limit tribal sovereignty, we now review petitioners' argument that Congress, when it enacted two federal Acts governing Indians and various pieces of federal energy legislation, deprived the Tribe of its authority to impose the severance tax." 455 U.S. at 149. As discussed above, the Court found no divestment and thus upheld tribal jurisdiction. *Id.* at 149-152.

In *New Mexico v. Mescalero Apache Tribe*, the state relied on *Montana* for its claimed jurisdiction to regulate hunting and fishing of non-Indians on Indian land. The Court made quite clear the *Montana* rule's land basis.

Our decision in *Montana v. United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to "land belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits."

462 U.S. at 330-331 (alterations in original; citations and footnote omitted).

The issue in *Brendale* was zoning of lands within a reservation but owned in fee by non-Indians. 492 U.S. at

417-418, 428. The plurality in *Brendale* begins by stating that:

We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee land in *Montana v. United States*. . . . In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the avowed purpose of the allotment policy was the ultimate destruction of tribal government."

Id. at 423 (alteration in original; citations omitted).

The plurality in *Brendale* went on to distinguish the *Iowa Mutual* rule cases such as *Merrion* and *Washington v. Confederated Tribes* by stating that they "did not involve the regulation of fee lands, as did *Montana*." 492 U.S. at 427; accord *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) ("Strictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land").

In *Bourland*, the Court determined that "[o]ur reading of the relevant statutes persuades us that Congress has abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project." 508 U.S. at 687. The relevant statutes were the Flood Control Act of 1944, 58 Stat. 887, and the Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191. 508 U.S. at 683-684. The Court in *Bourland* equated the effect of these statutes with that of the General Allotment Act. As in *Montana* and *Brendale*, the Court found that the statutes in *Bourland* showed congressional intent to divest the tribe's right to regulate the activities of non-Indians on land which was no longer Indian land. *Id.* at 688-694.

Once it is realized that the *Montana* rule's application is limited to instances where Congress has alienated land from Indian title, it follows that the *Montana* rule is consistent with

the *Iowa Mutual* rule presuming tribal jurisdiction where the land involved continues to be Indian land.⁹

D. 25 U.S.C. § 323, under which the State was granted an easement to improve and maintain a highway across Indian trust land within the Reservation, does not divest the Tribe of its civil jurisdiction over the activities of non-Indians on the highway

1. Since the highway remains Indian land, the Tribe retains jurisdiction over non-Indian activities on the highway

It is undisputed that the injury accident underlying this case took place on North Dakota Highway 8 within the boundaries of the Tribe's Reservation. Highway 8 first entered the Reservation pursuant to a right-of-way granted by the Bureau of Indian Affairs to the North Dakota Highway Department on May 8, 1970, under 25 U.S.C. §§ 323-328, Act of Feb. 5, 1948, 62 Stat. 17, entitled "Rights-of-Way Across Indian Lands" (hereinafter the 1948 Act).

Within the Reservation, Highway 8 crosses 6.59 miles of land held in trust by the federal government for the Tribe and tribal members before it ends at the shores of Lake Sakakawea. Highway 8 does not cross any land owned in fee by non-Indians within the Reservation.

Section 323 of the 1948 Act provides that:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian

⁹ Even where land has been alienated, a different result is called for in the less obtrusive area of adjudicatory jurisdiction. See *infra* at Section D, subsection 2 of this Part of this Brief.

tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323.

Section 324 of the 1948 Act requires the consent of tribes and individual Indians to the granting of a right-of-way across their lands. 25 U.S.C. § 324.¹⁰ Subsequent sections provide for payment and disposition of compensation to the Indian land owners; a savings clause for provisions of other federal statutes; applications for rights-of-way by federal agencies; and, agency administrative rule making authority. 25 U.S.C. §§ 325-328; *see also* 25 C.F.R. Part 169 (the 1948 Act's implementing regulations promulgated by the Bureau of Indian Affairs).

Nothing in the language of the 1948 Act expressly divests the Tribe of its civil jurisdiction over the conduct of non-Indians.¹¹ Under a strict application of the *Iowa Mutual* rule, that should end the inquiry and tribal jurisdiction in the present case should be upheld. "Congress has the power to abrogate Indians' treaty rights, though we usually insist that Congress clearly express its intent to do so." *Bourland*, 508 U.S. at 687 (citations omitted).

The Court in *Bourland* explains, however, that "what is relevant . . . is the effect of the land alienation . . . on Indian treaty rights tied to Indian use and occupation of reservation

¹⁰ This important provision distinguishes rights-of-way granted under the 1948 Act from rights-of-way granted under earlier statutes such as 25 U.S.C. § 311, Act of March 3, 1901, 31 Stat. 1083.

¹¹ The legislative history indicates that the purpose of the 1948 Act was primarily administrative. S. Rep. No. 823, 80th Congr., 2nd Sess. (1948), *reprinted in* U.S.C.C.S. 1033-1037. The 1948 Act was intended to address problems that had arisen due to scattered acts of Congress governing various kinds of rights-of-way on various types of Indian land. Under the 1948 Act, subject to Indian consent, the Secretary of the Interior would have "authority to grant rights-of-way of any nature over the Indian lands" described in the 1948 Act. *Id.* at 1036.

land." 508 U.S. at 692 *quoting Montana*, 450 U.S. at 559-560 n.9. The effect of the right-of-way here on the Tribe's right to use and occupy the right-of-way and the underlying land is quite different than the effects of the land alienation in *Montana* and *Bourland*.

Under the right-of-way in the present case, the State acquired an easement, which is a property right less than fee simple.¹² The easement is specifically to improve and maintain Highway 8. This easement likely also includes rights reasonably related to this specific right, such as, for example, the right to set vehicle weight limits on the highway. The easement is subject to substantial federal law and regulation. *United States v. Mitchell*, 463 U.S. 206, 223 (1983) (noting the comprehensive federal control over grants of rights-of-way effectuated under the 1948 Act); *see also* 25 C.F.R. Part 169.

The land underlying the right-of-way remains Indian trust land. *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902-904 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (absent congressional provision otherwise, Indians retain beneficial title to land underlying railroad right-of-way on reservation); *accord Davis v. Director, North Dakota Dep't of Transp.*, 467 N.W.2d 420, 422 (N.D. 1991)

¹² *See* Grant of Easement for Right-of-Way from the Bureau of Indian Affairs to the North Dakota Highway Department (May 8, 1970), certified copy lodged separately with the Court. An easement is a limited right to use property for a specific purpose. *See generally* Roger A. Cunningham, William B. Stoebe, and Dale A. Whitman, *The Law of Property*, 436-437 (2d. ed. 1993). Uses reasonably related to the specific purpose are permitted where such uses do not interfere unreasonably with the underlying property, title to which remains with the landowner when an easement is granted. *Id.* at 459-461. When an easement terminates, the limited right of use granted to the easement holder reverts to the landowner. *Preseault v. I.C.C.*, 494 U.S. 1, 9 (1990). These property law principles generally apply to rights-of-way granted across Indian lands. *See, e.g., Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985) (utility company which received right-of-way from tribe holds an easement).

(within Indian reservations, state highways are "Indian country" within the meaning of 18 U.S.C. § 1151).

The Tribe exerts jurisdiction over the highway. The Tribe regulates traffic offenses on the Reservation, including the civil offense of abandoned vehicles by any person on any type of land within the Reservation. Code of Laws of the Three Affiliated Tribes, Chap. 4-A. The Tribe's Highway Ordinance regulates, *inter alia*, advertising signs and seasonal vehicle use on all highways on the Reservation. Code of Laws of the Three Affiliated Tribes, Chap. 28, Secs. 1.02, 1.10, 1.11 (Tribal Business Council Resolution 88-37-TL, Jan. 29, 1988).

Rights-of-ways such as Highway 8 are Indian land to which the *Iowa Mutual* rule applies. See, e.g., *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d at 904-905 (upholding, in the absence of congressional divestment, the tribes' right to tax non-Indian activities on railroad rights-of-way crossing Indian land within a reservation); see also *Hinshaw v. Mahler*, 42 F.3d at 1179-1180, (absent congressional divestment, upholding a tribal court's authority to hear tort claims brought by a tribal member against a non-Indian which arose on a federal highway running through a reservation); but cf. *Yellowstone County v. Pease*, 96 F.3d at 1175-1176 (explaining *Hinshaw* as a *Montana* rule case, not an *Iowa Mutual* rule case).

2. Even assuming *arguendo* that the right-of-way for Highway 8 takes the highway out of the category of Indian land, tribal adjudicatory jurisdiction remains

The Tribe maintains that the highway in the present case is Indian land. Assuming *arguendo*, however, that this Court should disagree, the Tribe's court may nevertheless hear Mrs. Fredericks' action.

a. The presumption of tribal civil adjudicatory jurisdiction applies even where Indian title has been alienated

This Court's cases show that, even on non-Indian land where Congress has limited tribal regulatory jurisdiction over non-Indian activities, tribal adjudicatory jurisdiction over civil actions against non-Indians remains.¹³

In *National Farmers* this Court refused to foreclose tribal court jurisdiction over a civil tort claim against non-Indians which arose on "[fee] land owned by the State [of Montana] within the boundaries of the Crow Indian Reservation." 471 U.S. at 847 & 853-856. Previously, in *Montana*, the Court had held that the Crow Tribe could not regulate the hunting and fishing of non-Indians on land owned in fee by the non-Indians within the Crow Reservation. 450 U.S. at 557-567.

In *Iowa Mutual*, the Court refused to find against tribal court jurisdiction over a civil tort claim against a non-Indian which arose on a federal highway within an Indian reservation. Brief for Petitioner at 2, *Iowa Mutual*, 480 U.S. 9; 480 U.S. at 16-19. But in *Bourland*, where the federal government had taken reservation land for a flood control project, this Court held that the tribe had lost its general right to regulate non-Indian activities on the taken land. 508 U.S. at 689.

This situation for tribes has parallels in federal preemption of state sovereignty. Congress may preempt or limit state regulation of an area while leaving adjudication of claims in that area to state courts. For example, state courts may hear claims brought under federal civil rights laws. *Allen v. McCurry*, 449 U.S. 90, 99-101 (1980). State and federal courts have concurrent jurisdiction to hear claims under the Federal Employees Liability Act, 45 U.S.C. § 56, which governs, *inter alia*, occupational injuries on railroad rights-of-way. Indeed, the general rule is that, unless Congress has

¹³ For a broader discussion of the difference between tribal regulatory and tribal adjudicatory jurisdictions, see generally Brief *Amici Curiae* of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, *et al.*, in support of Petitioners in this case.

expressly preempted state adjudicatory jurisdiction as well as regulatory jurisdiction, state court jurisdiction remains. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823-826 (1990) (to give federal courts exclusive jurisdiction over federal cause of action, Congress must affirmatively divest state courts of their presumptively concurrent jurisdiction).

The adjudicatory jurisdiction of one sovereign is not per se inconsistent with the regulatory power of another sovereign within the forum sovereign's territory. *See, e.g.*, 16 U.S.C. § 457 (personal injury and wrongful-death actions involving events occurring within a national park or other place subject to the exclusive [regulatory] jurisdiction of the United States, within the exterior boundaries of any state, shall be maintained as if the place were under the [adjudicatory] jurisdiction of the state), *cited in Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-481 (1981).

b. The existence of tribal court jurisdiction concurrent with the state courts does not pose the compliance problems of conflicting regulatory schemes

The present case presents no conflict between competing regulatory claims of a tribe and a state but rather a claim to tribal adjudicatory jurisdiction concurrent with the State of North Dakota.¹⁴ In contrast, the *Montana* rule cases all involved competing and conflicting claims to regulatory jurisdiction. *Montana*, 450 U.S. at 564 n.13 (state and tribe sought competing jurisdiction over non-Indian hunting and fishing on non-Indian fee lands within a reservation); *Brendale*, 492 U.S. at 414 (tribe and county both claimed authority to zone fee lands owned by nonmembers of the tribe located within a reservation); *Bourland*, 508 U.S. at 685 (state and tribe regulated non-Indians in the "taken" land area of a reservation).

¹⁴ The district court below found that tribal court jurisdiction in this case is "not exclusive," presumably implying concurrent jurisdiction with the courts of North Dakota, J.A. 63-64.

The compliance problems inherent in conflicting non-taxation regulatory schemes, *e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 338 (individuals cannot comply with conflicting substantive hunting and fishing regulations emanating from two separate sovereigns), are not present in cases of adjudicatory jurisdiction. *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986) (state and tribe have concurrent jurisdiction over reservation-based civil court actions brought by tribes against non-Indians).¹⁵

Concurrent tribal jurisdiction over a civil action arising on a reservation is consistent with several aspects of North Dakota law, including the general rule of plaintiff's choice of forum, *see, e.g.*, *Raaum v. Powers*, 396 N.W.2d 306 (N.D. 1986); the doctrine of forum non conveniens, *see, e.g.*, *North Valley Water Ass'n v. Northern Improvement Co.*, 415 N.W.2d 492, 497 (N.D. 1987); and, the accordance of comity to the enforcement of tribal court judgments. *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990); *accord* N.D. S.Ct. Rule 7.2.¹⁶

Moreover, the existence of a court's jurisdiction does not necessarily command the exercise of that jurisdiction in every case. *See Quackenbush v. Allstate Ins. Co.*, ___ U.S. ___, 116 S.Ct. 1712, 1720 (1996) (rule that federal courts have a virtually unflagging obligation to exercise their jurisdiction is not an absolute rule). Many doctrines and rules of law are available to litigants and courts to determine whether jurisdiction will in fact be exercised in a particular case. These

¹⁵ States and tribes may also have concurrent taxing jurisdiction over the activities of non-Indians on Indian land. *Washington v. Confederated Tribes*, 447 U.S. at 154-159 (cigarette purchases); *accord Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance).

¹⁶ For a broader discussion of tribal court full faith and credit law, *see generally* Brief *Amicus Curiae* of the Northern Plains Tribal Judges Association in support of Petitioners in this case.

include, *inter alia*, issues of personal jurisdiction;¹⁷ forum non conveniens; choice of law; rules of decision;¹⁸ comity; and, abstention.

Finally, tribal courts are cognizant of the rule that "federal law defines the outer boundaries of an Indian tribe's power over non-Indians . . . [and that] a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers*, 471 U.S. at 851, 853.

II. ASSUMING ARGUENDO THAT THE MONTANA RULE APPLIES, THERE IS A CONSENSUAL RELATIONSHIP AND / OR A DIRECT EFFECT IN THIS CASE SUFFICIENT FOR THE TRIBE TO EXERCISE ADJUDICATORY JURISDICTION

The *Montana* rule is inapplicable to this case arising on Indian land and involving tribal adjudicatory jurisdiction. Even assuming, however, that the *Montana* rule applies, the Tribe has jurisdiction under that rule.

Montana teaches that inherent tribal jurisdiction over the activities of non-Indians on non-Indian fee land has not been

¹⁷ The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, mandates that tribal governments accord, *inter alia*, due process and equal protection to those persons who are subject to tribal jurisdiction. See *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56-58, 60-63; see also Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 3.3 (personal jurisdiction).

¹⁸ The Tribe's Code expressly permits the parties to stipulate to the application of state law in the absence of relevant tribal law. Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 2.5(4); see also *Diamond Ring Trucking and Excavating v. Dawson*, Civ. No. 11-94-A04-461A (Ft. Berth. Tr. Ct. 1995) (tribal court looks to North Dakota law to determine appropriate standard of review for summary disposition and will recognize the affirmative defense of accord and satisfaction as it is interpreted by North Dakota law).

completely divested. 450 U.S. at 565-566.¹⁹ Such jurisdiction may exist if the "tribal interest test" is met. *Id.* This test is as follows

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566. (citations omitted).

Thus, a tribe has jurisdiction over non-Indians on non-Indian fee land where either: 1) there is a "consensual relationship" between the non-Indian and the tribe or a member of the tribe; or, 2) the tribe's political integrity, economic security, or health and welfare are threatened or directly affected. In this case both prongs of the test are met.

A. *Montana* contemplates that reasonably foreseeable acts stemming from a consensual relationship will be subject to tribal jurisdiction

It is undisputed that the \$12,490 subcontract between A-1 and LCM, a corporation wholly-owned by the Tribe, is a "consensual relationship" entered into on the Reservation. It is also undisputed that in performing its subcontract, A-1

¹⁹ This is in contrast to tribal criminal jurisdiction over non-Indians, which has been completely divested and can only be restored by Congress. *Oliphant*, 435 U.S. at 211-212.

participated in the building of the Twin Buttes tribal community center on the Reservation. A-1 argues that this consensual relationship gives the Tribe jurisdiction only over disputes arising directly from the subcontract.

This view of the effect of a consensual relationship is too narrow. *Montana* holds that "Indian tribes retain inherent sovereign power . . . [to] . . . regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Tribal jurisdiction is not limited to the "four corners" of a consensual relationship. See *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (non-Indian company located on non-Indian fee land within a reservation is subject to tribal regulation of its employment practices because of the company's overall "substantial presence" on the reservation).

At a bare minimum, *Montana* recognizes tribal jurisdiction over the reasonably foreseeable consequences of a consensual relationship. See *FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1315 ("*FMC* is of course correct that at some point the commercial relationship becomes so attenuated or stale that *Montana*'s consensual relationship requirement would not be met"). It was reasonably foreseeable that A-1's employees might be involved in an accident while operating a gravel truck on the Reservation.

B. A-1's tortious conduct against a community member on the Reservation threatens the Tribe's economic security and political integrity

As a result of the accident with A-1's employee, Mrs. Fredericks was seriously injured and hospitalized for twenty-four days. Mrs. Fredericks is a long-time resident of the Reservation. She is the widow of a tribal member and the mother of five tribal members. She is very much a part of a tribal family and the Reservation community of Twin

Buttes.²⁰ A-1's conduct threatens the Tribe economically in terms of its provision of services to injured residents of the Reservation, especially when the injuries happened on the Reservation.

The State where the employee lives and where he was injured has a large and considerable interest in the event. "The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these. . . ." The State where the employee lives has perhaps even a larger concern, for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt. Certainly when the injury occurs in the home State of the employee, the interest of that State is at least commensurate with the interest of the State in which an injury occurs involving a nonresident. . . .

Crider v. Zurich Ins. Co., 380 U.S. 39, 41-42 (1965). Here, the place where Mrs. Fredericks lives and where she was injured are the same – the Reservation.

A-1's conduct also threatens the Tribe's political integrity in terms of its sovereign right to determine the law of torts on the Reservation. "[T]he advantages of a civilized society' . . . are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-138. "Tribal courts play a vital role in tribal self-government. . . ." *Iowa Mutual*, 480 U.S. at 14. A Tribe's court's role is critical particularly with respect to torts, an area of common law traditionally addressed through judicial fora. Judge Robert E. Keeton, *Part I: The Changing Lives of Professionals in Law*, 37 Ariz. L.

²⁰ Gisela Fredericks is closely related to tribal members, a distinction that has not gone unrecognized in tribal law and federal law. See *Brendale*, 492 U.S. at 438 (tribal law equated "close relatives of enrolled members" with members for purposes of access to area of reservation closed to nonmembers); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 86 (1977) (Congress equated "persons closely affiliated with tribes" with tribal members for purposes of judgment fund distribution).

Rev. 419 (1995) ("on the subject matter of tort law, courts come to mind as historically the principal lawmakers, using the common law process").

[I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur with the State. "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (citation omitted). The Tribe, no less than a state, has an essential interest in providing a court to hear tort claims arising within its territory and involving a member of its community.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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QUESTION PRESENTED

Whether the tribal court of the Three Affiliated Tribes has jurisdiction over a non-Indian's tort claim against another non-Indian arising out of an automobile accident occurring on a state highway located within a permanent federally granted right-of-way within the Fort Berthold Reservation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	6
I. THE TRIBAL COURT DOES NOT HAVE, AS PART OF ITS LIMITED SOVEREIGNTY, JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NONMEMBERS	6
A. Federal courts are the final arbiters of the extent of tribal court jurisdiction	9
B. This Court's jurisprudence demonstrates that the sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between nonmembers	10
1. Tribal sovereignty does not extend to civil adjudicatory jurisdiction over nonmembers.....	11
2. The historical record reveals that the Three Affiliated Tribes implicitly have been divested of the power to adjudicate civil claims against non-Indians	14
3. <i>Montana</i> governs assertions of retained tribal sovereignty over non-Indians in civil cases	24
a. <i>Iowa Mutual</i> does not remove civil adjudicatory jurisdiction from the <i>Montana</i> rule	27

TABLE OF CONTENTS - Continued

	Page
b. <i>Montana</i> applies to both tribal regulatory and adjudicatory jurisdiction ..	31
c. <i>Montana</i> applies to all lands where a tribe has been divested of any power to exclude or control	32
d. The <i>Montana</i> analysis applies to the federally granted rights-of-way for Highway 8.....	33
II. THE TRIBAL COURT DOES NOT HAVE JURISDICTION UNDER EITHER OF THE MONTANA EXCEPTIONS	39
A. A-1 and Stockert have no consensual relationships relevant to this action which could support jurisdiction	39
B. This tort action has no direct effect on the political integrity, economic security, or the health or welfare of the Tribes.....	42
CONCLUSION	44

TABLE OF AUTHORITIES

Page

CASES

<i>Brendale v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	passim
<i>Brown v. United States</i> , 32 Ct. Cl. 432 (1897).....	19
<i>Burlington Northern R.R. Co. v. Blackfeet Tribe</i> , 924 F.2d 899 (9th Cir. 1991).....	38
<i>County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	26, 43
<i>Duro v. Reina</i> , 495 U.S. 676 (1990).....	14, 26, 27, 44
<i>Ex parte Crow Dog</i> , 109 U.S. 556 (1883).....	6, 12
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).....	32
<i>Fletcher v. Peck</i> , 10 U.S. (6 Cranch) 87 (1810).....	13
<i>Fredericks v. Mandel</i> , 650 F.2d 144 (8th Cir. 1981).....	33
<i>Hinshaw v. Mahler</i> , 42 F.3d 1178 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994).....	36
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	passim
<i>Loring v. United States</i> , 610 F.2d 649 (9th Cir. 1979).....	33
<i>In re Mayfield</i> , 141 U.S. 107 (1891).....	21, 22
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	9
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	passim
<i>National Farmers Union Ins. Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985).....	10, 11, 14, 22, 28
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983).....	9

TABLE OF AUTHORITIES - Continued

Page

<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).....	12, 13, 14, 20, 21, 22
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974).....	33
<i>Randall v. Yakima Nation Tribal Court</i> , 841 F.2d 897 (9th Cir. 1988).....	7
<i>Raymond v. Raymond</i> , 83 F. 721 (8th Cir. (Indian Territory) 1897).....	21
<i>Red Fox v. Hettich</i> , 494 N.W.2d 638 (S.D. 1993).....	32
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	7
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993).....	9, 26, 37, 38, 44
<i>State of Idaho v. Oregon Short Line R.R.</i> , 617 F. Supp. 207 (D. Idaho 1985).....	37
<i>State of Wyoming v. Udall</i> , 379 F.2d 635 (10th Cir.), cert. denied, 389 U.S. 985 (1967).....	38
<i>Stock West Corp. v. Taylor</i> , 964 F.2d 912 (9th Cir. 1992).....	32
<i>Swift Transp., Inc. v. John</i> , 546 F. Supp. 1185 (D. Ariz. 1982), vacated on mootness grounds, 574 F. Supp. 710 (D. Ariz. 1983).....	34, 35
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896).....	7
<i>Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida</i> , 999 F.2d 503 (11th Cir. 1993).....	32
<i>Thomas v. Gay</i> , 169 U.S. 264 (1898).....	39
<i>Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, Inc.</i> , 476 U.S. 877 (1986).....	18

TABLE OF AUTHORITIES – Continued

	Page
<i>Tsosie v. United States</i> , 825 F.2d 393 (Fed. Cir. 1987)	19, 20
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	12, 13, 14, 24, 25
<i>Williams v. Lee</i> , 358 U.S. 217 (1959).....	31
<i>Wilson v. Marchington</i> , 934 F. Supp. 1176 (D. Mont. 1995).....	35, 36
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996).....	36
FEDERAL STATUTES, REGULATIONS AND EXECUTIVE ORDERS	
Act of May 1, 1888, art. VIII, 25 Stat. 113, 115-16	38
Act of May 2, 1890, 26 Stat. 81	20, 22
Acts of Congress dated March 3, 1891, 26 Stat. 1032	18
August 3, 1914, 38 Stat. 681	18
Executive Order dated April 12, 1870 (Grant), I C. Kappler, <i>Indian Affairs Laws & Treaties</i> at 883, <i>reprinted in Executive Orders Relating to Indians</i> <i>Reservations</i> at 133 (G.P.O. 1912)	18
February 18, 1907, 34 Stat. 894.....	18
General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-28 (1988)	5, 33, 34, 35
Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988)	7, 27
Indian Tribal Justice Act, 25 U.S.C. § 3611	23
June 1, 1910, Pub. L. No. 197, ch. 264, 36 Stat. 455	18

TABLE OF AUTHORITIES – Continued

	Page
March 3, 1917, 39 Stat. 1131	18
March 3, 1891, 26 Stat. 1032	18
Proclamation, April 7, 1917, 40 Stat. 1655 (Wilson)	18
Proclamation, June 28, 1911, 37 Stat. 1693 (Taft)	18
Proclamation, September 17, 1915, 79 Stat. 1748 (Wilson).....	18
Regulations of the Indian Department, 88-90 (G.P.O. 1884)	21
25 C.F.R. § 161.12.....	33, 35
25 C.F.R. § 161.3.....	35

TREATIES

Fort Laramie Treaty of September 17, 1851, 11 Stat. 749.....	16, 18
Treaty of July 18, 1825 with the Arikara Tribe, 7 Stat. 259	15, 18, 20, 23
Treaty of July 30, 1825 with the Mandan Tribe, 7 Stat. 264	15, 18, 20, 23
Treaty of July 30, 1825 with the Minnetaree (Gros Ventre) Tribe 7 Stat. 261	15, 18, 20, 23
United States and Cherokee Nation, July 19, 1866 (14 Stat. 799)	17, 18, 21, 23

MISCELLANEOUS

7 Op. Atty. Gen. 175 (1855).....	22
S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).....	23

TABLE OF AUTHORITIES - Continued

	Page
F. Cohen, <i>Handbook of Federal Indian Law</i> , 122 (1942)	13
Senate Hrgs. No. 291, 102d Cong., 1st Sess. 25 (1992)	23
I C. Kappler, <i>Indian Affairs Laws & Treaties</i> at 882 (1904 ed.)	16
II C. Kappler, <i>Indian Affairs Laws & Treaties</i> at 1052-1055 (1904 ed.)	16
<i>New Mexico Indian Tribal Court Handbook</i> (State Bar of New Mexico 1993 ed.)	9
Tribal Code of the Three Affiliated Tribes	9, 14

STATEMENT OF THE CASE

This is a personal injury action that was brought in the Tribal Court of the Three Affiliated Tribes ("Tribes") of the Fort Berthold Indian Reservation in North Dakota ("Tribal Court"). The action arises out of a traffic accident that occurred between two non-Indians on a state highway within the exterior boundaries of the Fort Berthold Indian Reservation. The issue is whether the Tribal Court has jurisdiction to hear this matter.

On November 9, 1990, Mr. Lyle Stockert, a non-Indian, was driving a gravel truck owned by A-1 Contractors ("A-1"), a non-Indian owned business with its principal place of business off the Reservation. He was traveling in the northbound lane on North Dakota Highway No. 8, near Twin Buttes, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation.¹ At the time Mr. Stockert was traveling north in the northbound lane, Ms. Fredericks was traveling south in the northbound lane. Although Mr. Stockert attempted to avoid a collision, Ms. Fredericks claims she was injured when her vehicle struck the truck. Ms. Fredericks is also non-Indian.²

¹ North Dakota Highway 8 crosses 6.59 miles of land within the reservation before it ends at the shores of Lake Sakakawea. Lake Sakakawea was created by the damming of the Missouri River pursuant to the 1944 Flood Control Act and is under the control of the Army Corps of Engineers. The easement provides that the State of North Dakota has control and responsibility for the realignment, improvement, and maintenance of Highway 8. See Appendix A. The highway has always been open to the general public.

² A factual dispute was not resolved concerning whether Fredericks resided on the Fort Berthold Reservation at the time

Ms. Fredericks sued Mr. Stockert and A-1 in Tribal Court seeking damages for alleged personal injuries she received in the accident. Ms. Fredericks' adult sons claim damages for loss of consortium. The Complaint requested compensatory damages in excess of \$3,032,000.00 and punitive damages in the amount of \$10,000,000.00.

Stockert made a special appearance and filed a motion to dismiss the action against him on grounds that the Tribal Court lacked personal jurisdiction over him and jurisdiction over the subject matter of the litigation; A-1 joined in the motion. In response to the motion, the only evidence the Fredericks advanced concerning the relationship between Stockert, A-1, and the Tribes was to proffer a copy of a subcontract agreement between A-1 and LCM, an entity described as a subsidiary of the Tribes. That contract had forum selection and choice of law provisions selecting Utah state courts and Utah law for dispute resolution. The Fredericks tendered no evidence concerning whether Stockert was acting under that subcontract or concerning the impacts of the contract or the accident on the Tribes.

Tribal Court Judge William Strate denied the motion to dismiss. (J.A. at 19-25) Stockert and A-1 appealed the Tribal Court decision to the Northern Plains Intertribal

of the accident. The original complaint in Tribal Court did not allege that Fredericks resided on the reservation. (J.A. at 5-10). The tribal judge concluded she did, though no facts were presented on the issue. (J.A. at 20-21). The district court found that the question "is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians." (J.A. at 58)

Court of Appeals and that court affirmed the Tribal Court's determination that the Tribal Court has personal and subject matter jurisdiction to hear this action. (J.A. at 26-37) While there has been no decision on the merits, it is undisputed that respondents have exhausted all available tribal remedies related to the jurisdictional issue presented.

Stockert and A-1 then brought this action in the United States District Court in North Dakota seeking declaratory and injunctive relief against the Tribal judge, the Tribal Court, and the Fredericks. In federal court, Mr. Stockert and A-1 challenged the Tribal Court's assumption of jurisdiction over a tort action between two non-Indians that arose on a state highway within a federally granted right-of-way traversing the reservation.

The parties filed cross-motions for summary judgment on the issue of the jurisdiction of the Tribal Court. The district court granted the motions of the Fredericks and the Tribal parties. A-1 and Stockert appealed from the order (J.A. at 54-65) and judgment (J.A. at 66-67)

A panel of the Eighth Circuit Court of Appeals initially affirmed the district court in a 2-1 decision. (J.A. at 68-90) That decision was vacated and rehearing *en banc* granted at the request of Stockert and A-1. In an 8-4 decision, the *en banc* Court of Appeals reversed the district court, holding that the Tribal Court lacked jurisdiction to hear the matter. (J.A. at 91-138) This Court granted petitioners' request for a writ of certiorari and ordered an expedited briefing schedule.

SUMMARY OF ARGUMENT

1. The Tribal Court does not have jurisdiction over an action between non-Indians that arises out of an automobile accident that occurred on a state highway within a federally granted right-of-way within the exterior boundaries of the Fort Berthold Reservation. The sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between nonmembers. Even if civil adjudicatory powers survived incorporation of the Tribes into the United States, the historical record here confirms that any such power has been divested by applicable treaties and agreements. The retained tribal sovereignty of the Tribes does not extend to civil actions over nonmembers. However, even if the Tribes may have such power, it can apply only in the limited situations meeting the test announced in *Montana v. United States*, 450 U.S. 544 (1981).

This Court should adopt the comprehensive and integrated rule outlined by the Court of Appeals that harmonizes existing precedent concerning the scope of civil jurisdiction over non-Indians:

[A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(J.A. at 108). Here, Ms. Fredericks has not established the presence of any valid tribal interest to justify tribal court jurisdiction.

2. Assuming that tribal courts have not been generally divested of civil jurisdiction over non-Indians absent compliance with the *Montana* exceptions, the Tribal Court still lacks jurisdiction in this case since the federal right-of-way, granted by the Secretary of the Interior pursuant to the General Right-of-Way Act of 1948, 25 U.S.C. § 323, divested the Tribes of civil jurisdiction over the activities of nonmembers on the highway. The right-of-way grant and the opening of the highway to the general public divested the tribe of any authority to exclude or regulate the conduct of nonmembers on the state highway.

3. The Tribal Court does not have jurisdiction under either of the *Montana* exceptions. Petitioners have not established that either exception applies. First, respondents entered into no consensual relationships relevant to the accident which would create jurisdiction. They had no direct consensual relationship with Ms. Fredericks. Even if A-1's subcontract with a tribally owned corporation could evidence a consensual relationship by which it could be deemed to have submitted to jurisdiction in an action by Ms. Fredericks, that subcontract evinces just the opposite intent, that disputes be resolved in Utah courts under Utah law. Second, preventing Ms. Fredericks from pursuing the matter in the Tribal Court would have no direct effect on the political integrity, economic security, or health or welfare of the tribe. The state courts of North Dakota are more than adequate to protect any such interests implicated by the tort action between Ms. Fredericks, A-1, and Mr. Stockert.

ARGUMENT

I. THE TRIBAL COURT DOES NOT HAVE, AS PART OF ITS LIMITED SOVEREIGNTY, JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-MEMBERS.

This case presents serious issues for non-Indian citizens of western states like North Dakota, who live in or travel across the boundaries of Indian reservations,³ and potentially for Indians who are not members of the tribe occupying such reservations. If non-Indians or nonmember Indians, for whatever reasons, cross reservation lands on county, state, or federal roads, under petitioners' construction of federal Indian law, they run the risk of being forced into a tribal civil court within a system of justice foreign to them.⁴ There, the risk of financial and personal

³ The Fort Berthold Indian Reservation contains almost as many nonmembers as member residents. Petitioners' Br. 2-3. Much of it is fee land owned by non-Indians. It is within the State of North Dakota and surrounds Lake Sakakawea, a haven for sailors and fisherman, created by the Garrison Dam on the Missouri River. It is traversed by several state highways.

⁴ The Court in *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883), eloquently described how the Indian defendant in that case would feel in a "foreign" court: "It is a case where [the law] . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries

ruin without federally protected constitutional due process or equal protection protections is very real.⁵ This Court's decisions leave unresolved whether federal courts may review tribal courts' deprivations of fundamental equal protection and due process rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988) ("ICRA"). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court declined to allow federal court review of a tribal policy which allowed children of male members who marry outside the tribe to become members, but denied tribal membership to similarly situated children of female members. In declining to intervene to enforce ICRA due process and equal protection provisions, the majority of the Court held that the ICRA provided federal courts with no original jurisdiction over an ICRA claim. *Santa Clara* involved a fundamental issue of internal tribal self government, tribal rules for membership, and the Martinez's had not exhausted tribal judicial remedies. Nonetheless, *Santa Clara* has been argued to preclude

them not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their . . . nature; one which measures the red man's revenge by the maxims of the white man's morality."

⁵ Of course, the Constitution is not applicable to tribes. See *Talton v. Mayes*, 163 U.S. 376 (1896). And, even though the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1988), includes due process and equal protection language, those clauses do not necessarily provide protection equivalent to the Constitution. See *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988).

federal court review of deprivations of non-Indians' civil rights in civil suits in tribal courts. Petitioners' Br. 14 n.7.

Nonmember citizens might be placed in the undesirable situation, contrary to long-standing federal policy of encouraging intercourse with tribes, where the only safe course is to avoid interaction with their Native American friends, neighbors, and interests on the reservation. For others, including states and railroads, it could mean rebuilding the infrastructure so that state and federal highways and other roads would allow travelers to bypass reservation lands in order to remain secure in their person and property.

However, a North Dakota state court, the State in which both Ms. Fredericks and Mr. Stockert are citizens, stands open to them for fair redress of grievances just a few miles from the scene of the accident. Ms. Fredericks preferred initially to bring this action in a court which has only been in the business of attempting to dispense Anglo-American jurisprudence for slightly over two decades, and would apply customs or traditions foreign at least to Mr. Stockert and A-1.⁶ Tribal judges often are not trained in law and serve at the whim of the tribal

⁶ Ms. Fredericks has recently commenced a parallel action in North Dakota District Court, Southwestern Division, County of Dunn, Civil No. 96 C 41. A-1 and Stockert have answered that state court complaint and are prepared to proceed in that forum. Interestingly, the courthouse for Dunn County, in Manning, North Dakota, is physically much closer by road to the accident scene near Twin Buttes than the tribal courthouse in Mandaree, North Dakota.

council, without any effective separation of powers to compensate for frequent political turmoil.⁷

Certainly sovereign power of this magnitude over nonmembers is not consistent with the status of tribes as *limited* sovereigns and has never been delegated by Congress. This Court has never allowed unbridled tribal court jurisdiction in a civil matter involving two nonmembers. Tribal jurisdiction over non-Indians has been limited to situations where a tribal interest is directly affected. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Montana v. United States*, 450 U.S. 544 (1981); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

A. Federal courts are the final arbiters of the extent of tribal court jurisdiction.

The jurisdiction of a Tribal Court depends upon the retained sovereignty of the Tribe. Because the jurisdiction of tribal courts is limited by federal law and federal courts' interpretation of tribes' retained sovereignty, the question of the scope of tribal court jurisdiction is a

⁷ Tribal constitutions and law and order codes governing courts across the country provide for review of tribal court decisions by elected tribal officials. See, e.g., *New Mexico Indian Tribal Court Handbook* (State Bar of New Mexico 1993 ed.) (Pueblo de Acoma and Santa Clara Pueblo – appeals from tribal court to Pueblo Council, the elected governing body of the Pueblo; Pueblo of San Juan – appeals to elected Pueblo Governor). Moreover, many tribal courts limit jury service to tribal members, notwithstanding that nonmembers and non-Indians may reside on the reservation. See, e.g., Ch. 2 Section 8(c) of the Tribal Code of the Three Affiliated Tribes.

federal one. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).⁸ As a matter of law, the Tribal Court of the Three Affiliated Tribes lacks subject matter jurisdiction to hear the Fredericks' claims because the Tribes' retained sovereignty is limited to matters involving tribal members or a vital tribal interest as outlined in *Montana v. United States*, 450 U.S. 544 (1981). This Court should affirm the decision of the U.S. Court of Appeals of the Eighth Circuit.

B. This Court's jurisprudence demonstrates that the sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between nonmembers.

Petitioners and the United States' arguments premised upon language in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), that tribes "presumptively" have civil jurisdiction over non-Indians, overlook the starting point this Court has prescribed for determining the jurisdiction of tribal courts. In *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court held that:

the existence and extent of a tribal court's jurisdiction will require a careful examination of

⁸ As noted, Mr. Stockert and A-1 have fulfilled the exhaustion requirement announced in *National Farmers Union*, which was extended in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), to require referral in diversity cases.

tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at 855-56 (footnote omitted). Advancing broad principles divorced from their factual moorings, neither petitioners nor their *amici* make the "careful examination" this Court requires. The discussion that follows will demonstrate (1) that tribal sovereignty does not extend to civil adjudicatory jurisdiction over nonmembers; see Point I.B.(1), *infra*; (2) that the required detailed study of statutes, treaties, and executive orders applicable to the Fort Berthold Reservation reflects that the Tribes relinquished or were divested of any inherent authority that survived their incorporation into the United States, see Point I.B.(2), *infra*; and (3) that *Montana v. United States*, 450 U.S. 544 (1981), and other judicial decisions teach that tribal civil adjudicatory jurisdiction over an action between non-Indians is unsupportable on the record in this case, see Point I.B.(3), *infra*.

1. Tribal sovereignty does not extend to civil adjudicatory jurisdiction over nonmembers.

This Court has drawn sharp distinctions between a tribal court's jurisdiction over members and

nonmembers.⁹ In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 213 (1978), the Court held that a tribal court could not exercise criminal jurisdiction over a non-Indian for criminal acts committed on Indian territory. Indian tribes do not retain powers that are "inconsistent with their status as domestic dependent nations." *Id.*; see also *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

Contrary to petitioners' contentions that an express statutory divestiture of a tribal power is required, *Oliphant* held that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. The Court addressed criminal jurisdiction in terms that inform the present question:

[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . [a] great solicitude that its citizens be protected by the United States from

⁹ As the Court explained in *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883)

" . . . it was the very purpose . . . to introduce and naturalize among them . . . self-government, the regulation by themselves of *their own domestic affairs*, the maintenance of order and peace *among their own members* by the administration of their own laws and customs."

Id. at 568 (emphasis added).

unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

Oliphant, 435 U.S. at 210.

Hence, divestiture of adjudicatory powers has occurred implicitly by "incorporation into the territory of the United States." By specific treaty provision or by statute, Congress has taken away other attributes of sovereignty. The remaining authority has been described as "inherent powers of a limited sovereignty which has never been extinguished." *Wheeler*, 435 U.S. at 323, quoting F. Cohen, *Handbook of Federal Indian Law*, 122 (1942) (emphasis in original). The historical record, discussed below, supports that the Tribes were divested implicitly of civil adjudicatory power over non-Indians. See Point I.B(2), *infra*.

Central among the elements of sovereignty lost by incorporation into the territory of the United States was sovereignty "involving the relations between an Indian tribe and nonmembers of the Tribe." *Wheeler*, 435 U.S. at 326; accord, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989). This Court recognized early on the scope of this divestiture in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 145 (1810), that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty

amounts to the right of governing every person within their limits except themselves." In *Duro v. Reina*, 495 U.S. 676 (1990), the Court relied upon *Wheeler* and *Oliphant* to conclude that a tribal court does not have jurisdiction over a nonmember Indian. This Court's cases compel "the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members." *Id.* at 685. Tribes cannot expand their jurisdiction to matters inconsistent with their dependent status by enacting broad jurisdictional code provisions.¹⁰

2. The historical record reveals that the Three Affiliated Tribes implicitly have been divested of the power to adjudicate civil claims against non-Indians.

The "detailed study" *National Farmers Union* requires of the relevant historical record begins with treaties and agreements reached between the Three Affiliated Tribes and the United States in 1825, 1851, and 1866. In 1825, the Arikara, Mandan, and Minnetaree (Gros Ventre) Tribes, now the Three Affiliated Tribes, signed separate, yet virtually identical treaties with the United States. See Treaty

¹⁰ The subject matter jurisdiction provision of the Tribal Code of the Three Affiliated Tribes attempts to assume more power than the Tribes' dependent status permits. Subsection 3.5 states:

The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.

(J.A. at 34).

of July 18, 1825 with the Arikara Tribe, 7 Stat. 259; Treaty of July 30, 1825 with the Mandan Tribe, 7 Stat. 264; and Treaty of July 30, 1825 with the Minnetaree (Gros Ventre) Tribe, 7 Stat. 261 (collectively "the 1825 Treaties"). Those Treaties do not confer civil jurisdiction over non-Indians on the signatory Tribes, nor do they provide the Tribes with the power to exclude non-Indians from their lands. On the contrary, the 1825 Treaties confirm to the United States the power to allow nonmembers to pass through the Reservation. See, e.g., Treaty of July 18, 1825, Article 5 (Tribe agrees "to give safe conduct to all persons . . . authorized by the United States to pass through their country. . . .").

Importantly, the 1825 Treaties also provide repeatedly for a non-tribal forum or agency to resolve any disputes that may arise between members of the Tribes and non-Indians or nonmember Indians. In the 1825 Treaties, the signatory Tribes disclaim "private revenge or retaliation" for "injuries done" to members of the Tribes by non-Indians. Rather, the Tribes agreed that "complaints [for those injuries] shall be made, by the party injured, to the Superintendent or Agent of Indian Affairs or other person appointed by the President." See Treaty of July 18, 1825, Article VI. Under the 1825 Treaties' provisions, the United States agreed that the wrongdoer then was to be punished "agreeably to the laws of the United States."¹¹ It also agreed to provide full "indemnification" for any horses or other property stolen by a citizen of the United States from a member of the Tribes. Thus, the 1825

¹¹ The United States also agreed in the 1825 Treaties that it would prosecute crimes perpetrated on tribal members "as if the injury had been done to a white man." *Id.*

Treaties provided for federal, not tribal, remedies for injuries to Indians by alleged non-Indian wrongdoers.

The Tribes were also signatories to the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. Article II of that Treaty grants the United States "the right . . . to establish roads" within the territories of the tribes party to the agreement. *Id.* Further, Article III of the Treaty provides that the "United States bind themselves to protect [the signatory tribes] against the commission of all depredations by the people of the United States. . . ." *Id.*

The Fort Berthold Agreement of July 27, 1866 entered into between the Arikara, Gros Ventre, and Mandan Tribes and the United States,¹² provides further confirmation that resolution of disputes between members and non-Indians was to be federal, and not tribal. Under the 1866 Agreement, the Three Affiliated Tribes reaffirmed their commitments in the 1825 Treaties to federal resolution of disputes with non-Indians, agreeing to "deliver to the proper officer or officers of the United States, all offenders against the treaties, laws, or regulations of the United States . . .". The 1866 Agreement further contemplates federal, rather than tribal, resolution of disputes between the Tribes or their members and nonmember Indians and that "the same rule shall prevail with regard

¹² Although the 1866 Agreement apparently was unratified, see II C. Kappler, *Indian Affairs Laws & Treaties* at 1052-1055 (1904 ed.), Congress made appropriations in accordance with its provisions, see I C. Kappler, *Indian Affairs Laws & Treaties* at 882 (1904 ed.).

to compensation and punishment as in cases of depredations against citizens of the United States." 1866 Agreement, Article V. Given these provisions, it cannot have been contemplated that non-Indians would be subject to tribal court jurisdiction.

The 1866 Agreement's contemplation of federal primacy over claims against non-Indians traversing the Reservation is reflected in the 1866 Annual Report of the Commissioner of Indian Affairs:

. . . the commission effected a treaty at Fort Berthold . . . by which . . . a right-of-way [was obtained] . . .

The great amount of travel through the country occupied by these Indians . . . by persons en route to and from the gold regions of Montana, interfering greatly with the game upon which the Indians depend, has made it imperatively necessary that those routes should be made secure to travelers; and, at the same time, justice to the Indians required a liberal compensation for the damages necessarily resulting from this invasion of their hunting ranges.

1866 Report, 14.¹³ The 1866 Agreement reinforces the understandings reflected in the 1825 Treaties that the United States would take responsibility for administering compensation for the Tribes and their members for damages arising from non-Indians traversing the lands of the Three Affiliated Tribes.

¹³ Annual Reports of the Commissioner of Indian Affairs are located at the National Archives, Records of the Department of the Interior, Record Group No. 287.

The 1825 Treaties, the 1851 Treaty, and the 1866 Agreement, however, did not provide a reservation for the Three Affiliated Tribes. Subsequently, the Fort Berthold Reservation was created by Executive Order dated April 12, 1870. It was then diminished by authority of Acts of Congress dated March 3, 1891, February 18, 1907, June 1, 1910, August 3, 1914, and March 3, 1917, which were effectuated by Executive Orders dated July 13, 1880, which restored certain lands to the public domain, and June 29, 1911, September 17, 1915, and April 7, 1917, which opened unallotted agricultural lands on the Fort Berthold Reservation to settlement and entry under the homestead laws.¹⁴ As a consequence of these statutes and orders, almost half of the residents of the reservation now are non-Indians. See Petitioners' Br. 2-3.

This historical record mandates the conclusion that non-consenting non-Indians would not be subject to tribal court jurisdiction. The Three Affiliated Tribes recognized they would not adjudicate claims against non-Indians by treaty, agreement, and long non-use of the now asserted power.¹⁵ Non-Indian settlers on opened

¹⁴ See Acts of Congress dated March 3, 1891, 26 Stat. 1032; February 18, 1907, 34 Stat. 894; June 1, 1910, Pub. L. No. 197, ch. 264, 36 Stat. 455; August 3, 1914, 38 Stat. 681; March 3, 1917, 39 Stat. 1131; Executive Order dated April 12, 1870 (Grant), 1 C. Kappler, *Indian Affairs Laws & Treaties* at 883, reprinted in *Executive Orders Relating to Indians Reservations* at 133 (G.P.O. 1912); Proclamation, June 28, 1911, 37 Stat. 1693 (Taft); Proclamation, September 17, 1915, 79 Stat. 1748 (Wilson); Proclamation, April 7, 1917, 40 Stat. 1655 (Wilson).

¹⁵ The Three Affiliated Tribes did not assert civil jurisdiction over non-consenting, non-Indians until the 1980's. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold*

lands on the Reservation doubtless relied on that understanding.

The treaty provisions requiring claims by tribal members arising from injuries or damages caused by non-Indians to be submitted to federal officials are consistent with the "established principle of international law that a nation is responsible for wrongs done by its citizens to the citizens of a friendly power. . . . This responsibility of a nation for the acts of its individual members is so well established and regulated by international law that it falls little short of being a natural right." *Brown v. United States*, 32 Ct.Cl. 432 (1897). As the Court of Claims recognized in *Brown*, "the United States has always held an Indian tribe in amity to a like responsibility." *Id.*

The continued validity of treaty provisions comparable to those present here was acknowledged by the Court of Appeals for the Federal Circuit in *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987). In *Tsosie*, an action filed after a Navajo tribal member's administrative claim had been denied within the Department of the Interior, the Court of Appeals found that an administrative remedy provision of the Navajo Treaty of June 1, 1868 provided the basis for an action in federal district court by an individual tribal member against the United States following the exhaustion of the applicable administrative remedy. 825 F.2d at 403. The court described the remedy provision as being "one between two nations" under which "each one promised redress for wrongs committed

Engineering, Inc., 476 U.S. 877, 889 (1986). That recent assertion cannot overcome agreements made more than 100 years ago, and honored by all since made.

by its nationals against those of the other nation." *Id.* at 400 n.2. The Treaty language indicates that the signatory tribe would not have civil jurisdiction over non-Indians for claims for damages for "wrongs committed against the person or property of the Indians. . . ." *Id.* at 400.

The contemplation that tribes will not resolve disputes involving non-consenting non-Indians also is reflected in historic, contemporaneous understandings regarding tribal courts' powers. Such pronouncements evidence the "common notions of the day" surrounding the 1825 Treaties and the 1866 Agreement that *Oliphant* instructs are material to determining the scope of retained tribal powers. *See Oliphant*, 435 U.S. at 206.¹⁶ As confirmed in the *amicus* briefs supporting petitioners, tribal courts' efforts to exercise civil adjudicatory jurisdiction over non-Indians are a relatively recent phenomenon. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197.

Even where tribal court systems existed, nineteenth century Congressional acts, treaties and Executive Branch materials, and judicial decisions consistently reflected the widely held understanding that Indian Tribes did not have civil jurisdiction over non-resident, non-Indians. *See, e.g.*, Act of May 2, 1890, 26 Stat. 81, 194 ("the judicial tribunals of the Indian nations" shall retain jurisdiction in

¹⁶ In *Oliphant*, the Court stated: "These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." 435 U.S. at 206.

cases in which tribal members shall be the only parties; federal courts have jurisdiction over actions in which a non-Indian was a party); Treaty between United States and Cherokee Nation, July 19, 1866 (14 Stat. 799) ("the United States District Court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal," where one party is a non-Indian, non-resident); *Raymond v. Raymond*, 83 F. 721, 722 (8th Cir. (Indian Territory) 1897) (Cherokee courts were effective only as to the "rights of the persons and property of members of the Cherokee Nation as against each other"); *see also* Regulations of the Indian Department, 88-90 (G.P.O. 1884) (Ninth Rule governing Courts of Indian Offenses provides jurisdiction over "civil suits where Indians are parties thereto").

In *Oliphant*, this Court addressed other contemporaneous understandings relevant here: the Court discussed *In re Mayfield*, 141 U.S. 107 (1891), at length to demonstrate that Congress' historic actions reflected "an intent to reserve jurisdiction over non-Indians for the federal courts." *Oliphant*, 435 U.S. at 204. While the Court addressed *Mayfield* with an eye toward the criminal jurisdictional question presented, the principles espoused in *Mayfield*, as reaffirmed in *Oliphant*, are equally applicable in the civil context.

In *Mayfield*, the Court discussed treaty and statutory provisions reflecting that federal, not tribal, courts would have jurisdiction in all civil and criminal cases unless the only parties to a case are tribal members by nativity or adoption. *See* 141 U.S. at 114-16, *quoting* Treaty with Cherokee Nation of July 19, 1866, 14 Stat. 799; and Act of May 2, 1890, 26 Stat. 81. Thus, when the Court in *Mayfield*

stated that "the general object of these statutes is . . . to reserve to the courts of the United States jurisdiction of all actions to which [non-tribal members] are parties on either side," the Court clearly referred to both civil and criminal matters. See 141 U.S. at 116, quoted in *Oliphant*, 435 U.S. at 204.¹⁷ Therefore, while *Oliphant* presented the question of criminal jurisdiction over non-Indians, the analysis which led to the result there applies forcefully in the civil context. See also *Montana*, 450 U.S. at 565 (the Court concluded that the same understandings underlying *Oliphant* "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

The historical record demonstrates that the Three Affiliated Tribes have been divested of any civil adjudicatory authority over non-members, plainly including those operating motor vehicles on state highways located on federally-granted rights-of-way. The backdrop of contemporaneous understandings confirms that the 1825 Treaties and the 1866 Agreement divested the Tribal Court of any subject matter jurisdiction it may have over this action. Consequently, this Court should acknowledge that the

¹⁷ Contrary to the suggestions of *amici* Yavapai-Apache Nation et al., 13, the 1855 Opinion of Attorney General Cushing, which the Court cited in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978), and quoted in *National Farmers*, 471 U.S. 845, 854-55 (1985), concluded only that the Choctaw Nation could exercise civil jurisdiction over a non-Indian who had, of his own free will, chosen to become a member of the tribe. See 7 Op. Atty. Gen. 175 (1855). That opinion is entirely consistent with the notion that tribes lack jurisdiction over non-consenting non-Indians.

1825 Treaties and 1866 Agreement provisions, reflecting consistent international law principles, divested the Three Affiliated Tribes of adjudicatory jurisdiction over nonmembers of those tribes.

The recent federal statutes and legislative history material discussed at length in the United States' Brief *amicus curiae* fails to reflect restoration of this historical divestiture of adjudicatory authority. See United States Br. 2-5. The statutes cited do not delegate to tribes civil adjudicatory jurisdiction over nonmembers. In the absence of a congressional authorization, the references are of no moment. See *Montana*, 450 U.S. at 564. In addition, the United States' quotation from the Indian Tribal Justice Act, 25 U.S.C. § 3611, reflects only legislative history of the Congress' understanding of certain aspects of federal Indian law as developed by this Court, rather than some affirmative statement of federal policy. See, e.g., United States Br. 4, S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993) ("Finding (5) was added to reflect the decision . . . of *Montana* . . .").¹⁸ These developments cannot serve to overcome the clear record that the Three Affiliated Tribes have been divested of any civil tribal court jurisdiction over nonmembers.

¹⁸ Further, Senator McCain of Arizona, Chair of the Senate Committee on Indian Affairs, commented in graphic terms that an earlier, comparable version of the Indian Tribal Justice Act was not intended to address the scope of tribal court jurisdiction because "there's going to be a lot of blood on the floor before we get the issue of jurisdiction resolved." Senate Hrgs. No. 291, 102d Cong., 1st Sess. 25 (1992).

3. *Montana* governs assertions of retained tribal sovereignty over non-Indians in civil cases.

This Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), is the lodestar by which any assertion of retained tribal sovereignty in civil matters must be judged. In *Montana*, the Crow Tribe sought to prohibit hunting and fishing within its reservation by anyone not a member of the tribe. The United States Supreme Court held that the Crow Tribe's inherent sovereignty did not support the Tribe's prohibition of hunting and fishing on fee lands owned by non-Indians. The Court recognized the general principle that the "*exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*" 450 U.S. at 564 (emphasis added). Because regulation of the non-Indian hunting and fishing on fee land owned by nonmembers of the tribe did not bear any "clear relationship to tribal self-government or internal relations," this general principle precluded extension of tribal jurisdiction to the non-Indian activities at issue. *Id.*

The Court in *Montana* highlighted what it made clear in *Wheeler*: regulation of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with the tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested. 450 U.S. at 565; quoting *Wheeler*, 435 U.S. at 326 (emphasis in *Montana*). It is this language that the Court relied upon in *Montana* to "distinguish between those inherent powers retained by the tribes and those

divested." *Montana*, 450 U.S. at 564. The Court in *Montana* reasoned:

[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many attributes of sovereignty. . . .

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe.* . . .

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.*

Montana, 450 U.S. at 563-64 (emphasis in original) (quoting *Wheeler*, 435 U.S. at 326).

The Court in *Montana* noted two "exceptions" to the general principle of limited tribal civil jurisdiction:

[There are two circumstances in which] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases,

or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. at 565-66 (citations omitted).¹⁹

Thus, these two narrowly circumscribed exceptions to the implicit divestiture of the power of tribes to control the activities of nonmembers are the only possible remaining bases upon which the Three Affiliated Tribes may assert civil jurisdiction over the non-Indians in this case. Given that *Montana* establishes a presumption that tribal civil power over non-Indians does not exist, and can only be supported by establishing one of the two *Montana* exceptions, the proponent of tribal civil jurisdiction must demonstrate that a *Montana* exception applies.

As the Eighth Circuit noted below, this Court has reaffirmed and broadened the sweep of the *Montana* analysis of civil jurisdiction over non-Indians. (J.A. at 99-100) (citing *South Dakota v. Bourland*, [508 U.S. 679, 693] 113 S. Ct. 2309, 2319 (1993); *County of Yakima v. Confederated*

¹⁹ The Court embraced *Montana* in *Duro v. Reina*, 495 U.S. 676, 688 (1990), which states that:

As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships" with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 267 (1992); *Duro*, 495 U.S. at 687-88, overruled by statute on other grounds, 25 U.S.C. § 1301(2)&(3); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality)). Petitioners advance no sound reasons for carving adjudicatory jurisdiction from the broad scope of the *Montana* rule. Consequently, the *en banc* Eighth Circuit correctly concluded that *Montana* governed its determination.

a. Iowa Mutual does not remove civil adjudicatory jurisdiction from the *Montana* rule.

In the face of this clear limitation of tribal civil jurisdiction over nonmembers absent express congressional delegation, the petitioners assert that *Montana* conflicts with *dictum* which they mischaracterize as the "*Iowa Mutual* rule".²⁰ See Petitioners' Br. 15; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). *Iowa Mutual* expressed no such "rule." Rather, it addressed only which court should first decide whether the tribal court had jurisdiction. It arose when an Indian, a worker on an Indian-owned ranch on the Blackfeet Reservation in Montana, was injured when he jackknifed a truck. He sued the ranch for personal injuries he sustained in the truck accident and joined its insurer for bad faith refusal to settle. The tribal court held it had subject matter jurisdiction. The insurer did not appeal to the tribal court of appeals,

²⁰ Although petitioners' attempt to portray some isolated language from *Iowa Mutual* as a "rule", their erroneous characterization does not make it so.

but instead sought a declaration of no coverage under its policy in federal district court under diversity jurisdiction.

The issue as framed by this Court was "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." *Iowa Mutual*, 480 U.S. at 11. The Court extended *National Farmers Union's* exhaustion requirement for federal question jurisdiction cases to those based on diversity jurisdiction as well, because principles of comity require federal courts to stay their hands until tribal court remedies have been exhausted. The Court noted that the Blackfeet Tribal Court's determination of tribal jurisdiction remained ultimately subject to federal review.

The only specific holding or "rule" in *Iowa Mutual* is that principles of comity require exhaustion of tribal remedies before a federal district court can decide the issue of federal court jurisdiction. *Iowa Mutual*, 480 U.S. at 18-19; see also *Brendale*, 492 U.S. at 427 n.10 (White, J., plurality) (*Iowa Mutual* only established an exhaustion rule and did not determine whether the tribe had jurisdiction over nonmembers). In addressing the exhaustion question, the Court made the following observation:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless

affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18.

The petitioners put too much emphasis upon the second sentence, and ignore the first sentence and the citation to *Montana*. As a consequence, petitioners and their amici effectively seek to nullify *Montana*.²¹

First, *Iowa Mutual* was simply an exhaustion case. It did not decide the broader question of tribal court civil jurisdiction over non-consenting nonmembers. See *Brendale*, 492 U.S. at 427 n.10. As such, petitioners' assertion that there exists an "*Iowa Mutual* rule" of presumptive tribal civil jurisdiction absent express congressional divestment is wrong. The *Iowa Mutual* case did not create such a rule either expressly or impliedly. As such, there is no conflict with *Montana* as petitioners assert.

More importantly, as the *en banc* decision below correctly concludes, the language in *Iowa Mutual*, upon which petitioners rely, "can and should be read more narrowly and in harmony with the principles set forth in *Montana*, which the Court cites in making those observations." (J.A. at 101).

In explaining how *Iowa Mutual* should be read in harmony with *Montana* the Court of Appeals noted:

²¹ Of course, as discussed *supra* at Point I.B.(2) and (3), *supra*, even if petitioners were correct, the applicable treaty provisions and grant of right-of-way serve to divest the Tribes of jurisdiction over actions involving nonmembers or non-Indians.

When the Court observes in *Iowa Mutual* that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. . . . Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

(J.A. at 102).

Iowa Mutual can and should be read only within the parameters of its recognition of the limitations on tribal civil jurisdiction over nonmembers outlined so clearly in *Montana*. As the Eighth Circuit *en banc* decision noted, a careful reading of the *Montana* and *Iowa Mutual* cases indicates that they can and should be read together to establish one comprehensive and integrated rule:

[A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-

Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(J.A. at 108).

Finally, contrary to petitioners' assertions, *Williams v. Lee*, 358 U.S. 217 (1959), does not support nonconsensual tort jurisdiction over a non-Indian defendant. In *Williams*, a non-Indian trader had a store on the Navajo Reservation. He sold goods on credit to members of the Tribe. Consistent with *Montana*'s later announced first exception, the trader had a consensual relationship with the tribal members he sought to collect from on transactions he made with them on the reservation. Therefore, he could not force the tribal members into a state court off the reservation to collect the debts arising from those on-reservation transactions. *Williams v. Lee* does not support an extension of tribal powers to require off-reservation nonmembers to defend a tribal court action filed by members with whom they have no consensual relationship.

b. *Montana* applies to both tribal regulatory and adjudicatory jurisdiction.

The petitioners attempt to limit *Montana* and its progeny to cases involving only regulatory power, and not adjudicatory power is unsound. In fact, as the Eighth Circuit noted below, "those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction." (J.A. at 107). Moreover, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to factual situations regarding regulatory jurisdiction. See *Iowa Mutual*, 480 U.S. at 18. The *en*

banc opinion aptly indicates that petitioners' attempt to apply such a distinction is, in this case, illusory since if the tribal court tried this suit it would essentially be acting in both an adjudicatory and regulatory capacity. (J.A. at 107). See also *Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993).

c. *Montana* applies to all lands where a tribe has been divested of any power to exclude or control.

While both *Montana* and *Brendale* involve questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limits its discussion, rationale or holding to issues arising on fee lands. Instead, *Montana* specifically found, without qualification, that *tribal power* itself is limited to what is necessary to protect tribal self government and to control internal relations, absent express congressional delegation of more expansive authority. *Montana*, 450 U.S. at 564. Furthermore, *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and outlined the two limited situations in which that jurisdiction may apply. *Id.* at 565. The Court did not limit its rationale to cases arising on non-Indian fee lands but referred broadly to tribal power over nonmembers.

Moreover, as the Court of Appeals aptly notes in its *en banc* decision "a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*." (J.A. at 106) (citing *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (*en banc*); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of*

Florida, 999 F.2d 503, 508 n.11 (11th Cir. 1993). The *en banc* decision correctly concluded that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both unconvincing and unsupported by the language of those two cases." (J.A. at 106).

d. The *Montana* analysis applies to the federally granted rights-of-way for Highway 8.

The accident underlying this case occurred on North Dakota Highway 8 within a grant of easement for right-of-way dated May 8, 1970, issued by the Secretary of the Interior pursuant to the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-28 (1988), and its implementing regulations.²² The only specific rights reserved to the Indian landowners were outlined in the easement:

²² In 1948, Congress enacted a comprehensive, general purpose right of way statute, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1988), which delegates to the Secretary, not to tribes, the right to grant rights-of-way for all purposes over and across tribal trust lands. See *Fredericks v. Mandel*, 650 F.2d 144, 147 (8th Cir. 1981) (the Fort Berthold Reservation tribal court had no jurisdiction to grant a right of way or easement over trust lands with the Fort Berthold Reservation). While 25 U.S.C. § 324 requires consent of the tribe, the right-of-way grantor is the United States. 25 U.S.C. § 325 and 25 C.F.R. § 161.12 prohibit the grant of rights-of way without the payment of just compensation. *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979). These consent and compensation provisions are triggered because the tribe's right of occupancy is to be extinguished. See generally *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

"the right is reserved to the Indian landowners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupany[sic] of the premises affected by the right-of-way; such crossing to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way which may be occasioned by such crossing."

The Tribes reserved no other right to exercise any dominion or control over the right-of-way in consenting to the grant by the Secretary. Thus, the grant of easement for right-of-way divested the Tribes of any and all rights, duties or control over North Dakota State Highway No. 8, except those narrow interests specifically reserved.

In deciding whether an accident which occurred on a U.S. highway within the boundaries of an Indian reservation supported tribal court jurisdiction, the district court in *Swift Transp., Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982), vacated on mootness grounds, 574 F. Supp. 710 (D. Ariz. 1983), examined the 1948 Rights-of-Way Act, the same statutory scheme under which the right-of-way here was granted. The *Swift* court noted that "[i]t is well established that Indian title is 'only a right of occupancy . . . extinguishable only by the United States.'" *Swift*, 546 F. Supp. at 1192 (citations omitted). After noting that an intent to extinguish Indian property rights is not lightly imputed to Congress and requires a clear expression of congressional intent, the court in *Swift* held that there was "just such a clear expression of congressional

intent to extinguish Indian title in rights-of-way such as U.S. Highway 89." *Id.*

In 1948 Congress enacted the Indian Rights-of-Way Act, 25 U.S.C. §§ 323-28, which empowers the Secretary of the Interior to grant rights-of-way for all purposes over Indian lands. The right-of-way for U.S. Highway 89 was established pursuant to this statute. Before granting a right-of-way the Secretary must obtain the consent of the landowner under most circumstances. 25 U.S.C. § 324; 25 C.F.R. § 161.3. Plaintiffs assert without contradiction that consent was obtained in this case. Moreover, § 325 and 25 C.F.R. § 161.12 prohibit the grant of rights-of-way without the payment of just compensation. These compensation and consent provisions plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished. *It is axiomatic that designating these lands as a U.S. Highway open to the general public is wholly inconsistent with an intent to allow the continued right of Indian occupancy.* Accordingly, the Court concludes that the status of U.S. Highway 89 is equivalent to that of the non-Indian fee land in *Montana*.

Id. (citations omitted).

In the present case, all statutory requirements were met in granting the easement to the State of North Dakota, including just compensation pursuant to the 1948 Act, 25 U.S.C. § 325. As in *Swift*, the compensation and consent provisions "plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished." *See also Wilson v. Marchington*, 934 F. Supp.

1176 (D. Mont. 1995) ("it is beyond dispute that designating a right-of-way as a U.S. Highway with the concomitant unrestricted access to the general public, abrogated any preexisting right to regulatory control" by the Indian tribe.)²³

The only specific rights reserved to the Tribes and its members involved the right to construct crossings of the right-of-way at all points reasonably necessary. (See Grant of Easement for Right-of-Way "The right is reserved to the Indian landowners, their lessees, successors and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupancy[sic] of the premises affected by the right-of-way. . . .") (Addendum A).

Tribal jurisdictional powers over reservation lands "must be read in light of the subsequent alienation of

²³ The district court, in *Marchington*, after undertaking a detailed analysis of why civil jurisdiction should not rest with the tribe, ultimately concluded that the court "constrained by the doctrine of *stare decisis*, is bound to follow the holding of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994)] despite the court's misgivings regarding the reasoning employed therein and the result dictated in the present action." Recently, the Ninth Circuit, in *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) rejected Pease's contention that *A-1 Contractors* was erroneous and in conflict with the *Hinshaw* decision. Instead, the *Pease* decision clarified that *Hinshaw* was consistent with the *Montana* decision and applied the *Montana* analytical framework. The *Pease* court also noted that the *Hinshaw* case is distinguishable in that "the tribal court plaintiff in *Hinshaw*, unlike the tribal court plaintiff in *A-1 Contractors*, was a tribal member residing on the reservation." See *Pease*, 96 F.3d at 1176 n.7 (9th Cir. 1996). In *Pease*, the Ninth Circuit rejected the assertion that the tribal court had jurisdiction.

those lands." *Montana*, 450 U.S. 561; *Bourland*, 508 U.S. at 697. In *Bourland*, the Court considered whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians on lands and overlying waters located within the tribe's reservation but acquired by the United States for operation of the Oahe Dam and Reservoir. The Cheyenne River Act reserved to the Tribe the use of the former reservation lands for minerals, grazing and access rights, and for hunting and fishing. The *Bourland* Court recognized that the taking from the Cheyenne River Sioux Reservation differed "from the conveyances of fee title in *Montana* . . . in that the terms of the Cheyenne River Act preserve certain limited land-use rights belonging to the Tribe." 508 U.S. at 692-93.

The Court then concluded that:

regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control. Although Montana involved lands conveyed in fee to non-Indians within the Crow Reservation, Montana's framework for examining the "effect of the land alienation" is applicable to the federal takings in this case.

Bourland, 508 U.S. at 692 (footnote omitted) (emphasis added).²⁴

²⁴ See, e.g., *State of Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207, 210 (D. Idaho 1985), wherein the court observed, in connection with railroads right-of-way acts passed by Congress after 1871, that "Congress, however, still intended railroads to have exclusive use and possession of railroad rights-of-way."

In this case, the easement the United States granted to the State of North Dakota for Highway 8, pursuant to the Indian Rights-Of-Way Act, completely opens up Highway 8 to the use and occupancy of all. Indeed, this 6.59 mile stretch of road is utilized to access the shores of Lake Sakakawea, a federally created water resource project. Anyone who seeks to enjoy the recreational activities and facilities located on Lake Sakakawea, which was created and is maintained by the Army Corps of Engineers pursuant to the Flood Control Act of 1944, may utilize this road. Since "Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Bourland*, 508 U.S. at 692.²⁵

See also *State of Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir.), cert. denied, 389 U.S. 985 (1967), wherein the court stated that "with the expansion of the meaning of 'easement' to include, so far as railroad are concerned, a right in perpetuity to exclusive use and possession, the need for the 'limited fee' label disappeared."

²⁵ Petitioners' reliance on *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), is not persuasive. Petitioners' Br. 21-22. The right-of-way there was acquired by the railroad's predecessor-in-interest from the United States through statute and presidential directive, with the tribes agreeing that the Secretary of the Interior, not themselves, would establish "such rules, regulations, limitations, and restrictions" as necessary and the "compensation" for the land taken. Act of May 1, 1888, art. VIII, 25 Stat. 113, 115-16. Under these circumstances, the Ninth Circuit's discussion concerning whether the rights-of-way "extinguish[ed] the Tribes' title" (924 F.2d at 902 n.5) added little, if anything, to the required substantive analysis since, whatever the precise nature of the tribal property interest, it was insufficient to preserve a claim to inherent regulatory jurisdiction over property whose control for

II. THE TRIBAL COURT DOES NOT HAVE JURISDICTION UNDER EITHER OF THE MONTANA EXCEPTIONS.

A. A-1 and Stockert have no consensual relationships relevant to this action which could support jurisdiction.

The first exception to the general principle outlined in *Montana* requires "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" in order to allow tribal jurisdiction over non-Indians. *Montana*, 450 U.S. at 565. The first *Montana* exception does not apply in this case for two reasons: A-1's subcontract with a tribal corporation is not material to this case, and, even if it were, it reflects that disputes will be resolved in a non-tribal forum.

This personal injury action was brought by a non-Indian, Ms. Fredericks, not the Three Affiliated Tribes.²⁶

right-of-way purposes has been retained by the federal government. Cf. *Thomas v. Gay*, 169 U.S. 264, 273 (1898) (indicating by analogy that Arizona and Idaho tribes' interest in railroad rights-of-way was too insubstantial to affect territories' taxation authority). Even less cause exists here to conclude that an underlying interest in the highway right-of-way serves as a basis for the Three Affiliated Tribes' exercise of inherent authority over nonmembers' conduct, since the State of North Dakota clearly possesses governmental responsibility for the highway's use and since, in light of this state authority, any suggestion that Congress intended the tribes to have control over access to the public highway is farfetched.

²⁶ Fredericks' five adult sons, who are allegedly part Indian and tribal members, do not confer jurisdiction. Their

Therefore, the inquiry regarding consensual relationship concerns whether Lyle Stockert or A-1 Contractors entered into consensual relationships with any of the Fredericks who are also members of the Tribe. Ms. Fredericks is not a member of the Tribe. Although her sons allegedly are members of the Three Affiliated Tribes, Stockert and A-1 have not entered into any consensual relationships with Ms. Fredericks or her sons. The Tribe is not a party, and any consensual relationship with the Tribe is not the subject of this case.

The petitioners and the United States argue that the consensual relationship test is satisfied in this case because A-1 entered into a landscaping subcontract with LCM, allegedly a subsidiary of the Tribe, to perform landscaping work on a tribal community building. Even if there were a nexus between the subcontract agreement and this case, it cannot be considered to supply A-1's consent to jurisdiction of a tribal court. The LCM contract provides for adjudication of disputes between A-1 and LCM under Utah law in Utah courts.²⁷ (J.A. at 111 n.5). Petitioners further overlook that Stockert had an unqualified right to use the state highway regardless of A-1's dealings with LCM. Finally, petitioners' contention that

consortium claims are not recognized causes of action and are derivative rather than independent causes of action. The question was not addressed by the tribal trial court or any of the subsequent reviewing courts.

²⁷ The contract was before the trial court, attached to plaintiffs' Fredericks' brief in opposition to motion to dismiss in tribal court. (J.A. at 111 n.5.) The question as to why the choice of law provisions were included in the contract was not addressed by any courts below.

Stockert was on the reservation in furtherance of that subcontract with LCM when the accident occurred has no record support.

The Court of Appeals properly rejected petitioners' argument that a consensual relationship supports tribal jurisdiction in this case. The *en banc* decision reasons that this is a simple personal injury lawsuit initiated by a non-Indian against another non-Indian arising out of a vehicular accident which happened to occur on a state highway within the geographical confines of the reservation. The personal injury action was brought by Ms. Fredericks, a non-Indian, not the Three Affiliated Tribes. The Tribes were not a party to the personal injury action, and any consensual relationship between the respondents and the Tribes bears no relationship to the subject of this case. As such, the *Montana* consensual relationship test is not satisfied.

Put plainly, the accident, rather than any contract with the Tribes, is the subject of the Fredericks' action. The dispute in this case arises from a simple automobile accident between two non-Indians and does not arise under the terms of, out of, or within the ambit of the "consensual relationship" with a tribal corporation. To suggest, as the petitioners do, that this meets the *Montana* "consensual relationship" test is unsupported, unwarranted, and would lead to an unfair result. If tribes can obtain unlimited nonconsensual civil jurisdiction relating to any matter or dispute, over a party who entered into a single commercial relationship with a tribe or its related entities, where the pertinent contract expressly foreclosed tribal court jurisdiction if a dispute arose, knowledgeable companies and persons may be far less interested in

entering into commercial arrangements with tribes. This Court should affirm the Court of Appeals' conclusion that the tribal court does not have subject matter jurisdiction under *Montana's* first exception.

B. This tort action has no direct effect on the political integrity, economic security, or the health or welfare of the tribe.

The second exception to the general principle outlined in *Montana* requires conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 466. Under this exception regulation of some activities of non-Indians or nonmembers on the reservation *may* be within the tribe's power. *Montana*, 450 U.S. at 565.

The Court has severely limited the power of tribes to regulate the activities of non-Indians. Justice White's opinion in *Brendale* found it "significant that the second *Montana* exception is prefaced by the word 'may'." 492 U.S. at 428-29. Use of the word "may" reflects "that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe,' but instead depends upon the circumstances." *Id.* at 429. Consequently to determine whether an "effect" meets the *Montana* threshold, a court must decide whether, and to what extent, the tribe has a "protectable interest" in the activities giving rise to such an effect, and

if it has such an interest, how it may be protected. *Brendale*, 492 U.S. at 430. The concept of a "protectable interest" grew out of a long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations. See *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 266-67 (1992). A protectable interest, if it exists, however, does not entitle a tribe to assert civil jurisdiction in every situation that has some adverse affect on the tribe. *Brendale*, 492 U.S. at 431. A protectable interest is "defined in terms of the impact of the challenged uses on the political integrity, economic security, or health or welfare of the tribe." *Id.* at 430-31. "The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

An alleged tort between non-Indians that occurred on a state highway running through the reservation does not threaten or have a direct effect on the political integrity, the economic security or the health and welfare of the tribe. In this case, the petitioners argue that the Tribes' interests in asserting their sovereign authority over events that occurred within the geographical boundaries of the reservation is, in and of itself, sufficient to meet the direct effect test outlined in *Montana*. However, such a broad ruling would completely ignore the dictates of this Court's prior decisions and would allow the exception to swallow up the rule.

As the *en banc* decision notes "this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception." (J.A. at 112). Any other result would

render meaningless this Court's previous rulings, including *Montana*, *Duro*, and *Bourland*. As noted in the Court of Appeals' decision, this case "is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory." (J.A. at 114).

Neither a consensual relationship nor matters directly affecting tribal self-government or internal relations under the *Montana* test are present in the Fredericks' action against Stockert. There was no consensual relationship between the Fredericks and Stockert. The Three Affiliated Tribe's economic security and general welfare would not suffer as a result if Ms. Fredericks must sue Lyle Stockert in a state court. The two limited circumstances in which Indian tribes may exercise civil jurisdiction over nonmembers are not present in this action. Therefore, the Tribal Court does not have subject matter jurisdiction over this action.

CONCLUSION

Respondents A-1 Contractors and Mr. Lyle Stockert respectfully request that the judgment of the Court of Appeals be affirmed and the case be remanded to the District Court for an order granting the injunctive and declaratory relief requested by Stockert and A-1.

Respectfully submitted,

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701/223-2711

APPENDIX

App. 1

301 10778

TRIBAL:	<u>0.00</u>
INDIVIDUALLY OWNED:	<u>87.48</u>
GOVERNMENT OWNED:	<u>0.00</u>
FILE NO: <u>S-345(10) & FLH 345(12) N.</u>	
<u>Dak.</u>	

GRANT OF EASEMENT FOR RIGHT-OF-WAY

KNOW ALL MEN BY THESE PRESENTS:

That the United States of America, acting by and through the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, Department of the Interior, New Town, North Dakota, hereinafter referred to as "Grantor", under authority contained in Order No. 2508 of the Secretary of the Interior (14 F. R. 258) and 10 BIAM 3 (34 F. R. 637) and pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17, 25 U.S.C. 323-328), and Part 161, Title 25, Code of Federal Regulations, in consideration of \$5,546.50 (Five Thousand Five Hundred Forty Six and 50/100 Dollars) and other good and valuable consideration, the receipt of which is acknowledged, does hereby grant to NORTH DAKOTA STATE HIGHWAY DEPARTMENT, BISMARCK, NORTH DAKOTA, hereinafter referred to as "Grantee", an easement for a right-of-way for the realignment and improvement of North Dakota State Highway No. 8 over, across and upon the following described lands located in the County of Dunn, in the state of North Dakota; to wit:

App. 2

Township 147 North, Range 91 West, Fifth P. M., N. Dak.

Sec. 23	W ¹ / ₂ SW ¹ / ₄	Al. 393
Sec. 23	E ¹ / ₂ SW ¹ / ₄ , SE ¹ / ₄	692-A
Sec. 24	NW ¹ / ₄ NE ¹ / ₄ , NE ¹ / ₄ NW ¹ / ₄	1100-A
Sec. 24	S ¹ / ₂ N ¹ / ₂ , SW ¹ / ₄	846-A
Sec. 26	W ¹ / ₂ NW ¹ / ₄	509-A
Sec. 27	NE ¹ / ₄ , SW ¹ / ₄	514-A
Sec. 27	N ¹ / ₂ SE ¹ / ₄ , SW ¹ / ₄ SE ¹ / ₄	387
Sec. 33	NE ¹ / ₄	777-A
Sec. 33	S ¹ / ₂	761-A
Sec. 34	NE ¹ / ₄ NW ¹ / ₄	457
Sec. 34	NW ¹ / ₄ NW ¹ / ₄	1593

Township 146 North, Range 91 West, Fifth P. M., N. Dak.

Sec. 4	Lots 3 & 4, S ¹ / ₂ NW ¹ / ₄	758-A
Sec. 5	S ¹ / ₂ NE ¹ / ₄	1964
Sec. 5	SE ¹ / ₄	1102-A
Sec. 8	NE ¹ / ₄	1102-A
Sec. 8	SE ¹ / ₄	1917
Sec. 9	N ¹ / ₂ SW ¹ / ₄	1917
Sec. 17	NE ¹ / ₄ NE ¹ / ₄	1917

The said easement, as shown on the map and plats attached hereto and made a part hereof, does not include any non-trust property, but applies to trust lands only and may be described in general as: Commencing at a point 1,069.4 feet North and 523.9 feet East of the Southwest corner of the Southeast Quarter of Sec. 12, T. 147 N., R. 91 W., 5th P. M., North Dakota, thence south on the centerline of State Highway No. 8 a distance of 1.73 miles (9,152.7 feet) to the POINT OF BEGINNING (Sta. 91 + 36.7 of survey), thence southwesterly on said centerline a

App. 3

distance of 6.44 miles to the Section line common to Sections 9 and 16, T. 146 N., R. 91 W., 5th P. M. North Dakota, thence west on said Section line a distance of 58.9 feet to the Section corner common to Sections 8, 9, 16 and 17, thence south on the Section line common to Section 16 and 17 a distance of 780.9 feet, to the POINT OF TERMINATION. The said length being approximately 6.59 miles, and of variable widths as more particularly delineated on the attached map and plats.

This easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose above specified; PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure by the Grantee within said notice period to correct the basis for termination (25 CFR 161.20):

A. Failure to comply with any term or condition of the grant or applicable regulations.

B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.

C. An abandonment of the right-of-way.

D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an Affidavit of Completion pursuant to 25 CFR 161.16.

E. The right is reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupancy [sic] of the premises

App. 4

affected by the right-of-way; such crossings to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way, which may be occasioned by such crossings.

The conditions of this easement shall extend to and be binding upon and shall inure to the benefit of the heirs, representatives, successors, and assigns of the Grantee.

IN WITNESS WHEREOF, Grantor has executed this grant of easement this 8th day of May, 1970.

UNITED STATES OF AMERICA

BY: /s/ James R. Keaton
James R. Keaton,
Superintendent
U. S. Department of the
Interior
Bureau of Indian Affairs
Fort Berthold Agency
New Town, North Dakota

State of North Dakota)
) SS:
County of Mountrail)

BE IT REMEMBERED, That on this 8th day of May, 1970, before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared James R. Keaton, to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the execution of the same.

App. 5

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal on the day and year last hereinabove written.

/s/ Anna M Morsette
Notary Public

My Commission expires
Jan. 10, 1974

DEC 27 1996

CLERK

In The
Supreme Court of the United States

October Term, 1996

THE HONORABLE WILLIAM STRATE, Associate Tribal
Judge of the Tribal Court of the Three Affiliated Tribes of
the Fort Berthold Indian Reservation; THE TRIBAL COURT
OF THE THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT
FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS
FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS
FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. ABSENT EXPRESS DIVESTMENT BY CONGRESS, THE TRIBE RETAINS INHERENT CIVIL JURISDICTION OVER THE CONDUCT OF NON-INDIANS ON INDIAN LAND	1
A. A Federal Grant of an Easement on Indian Trust Land to a State for Highway Purposes Does Not Divest Tribal Jurisdiction over Tortious Conduct by Non-Indians on the Highway	2
B. The Tribe's Treaties and Agreements with the United States do not Divest Tribal Civil Jurisdiction over Non-Indian Conduct on the Reservation	5
II. ALTERNATIVELY, EVEN IF THE SITE OF THE ACCIDENT WERE NOT INDIAN LAND, THE TRIBE RETAINS ADJUDICATORY JURISDICTION OVER THIS CASE	7
A. The Tribe Has Adjudicatory Jurisdiction over the Case Whether or Not it may Impose Tribal Law as the Substantive Rule of Decision	8
B. The <i>Montana</i> "Tribal Interest Test" Standing Alone Justifies the Tribal Court's Exercise of Adjudicatory Jurisdiction in the Case	11
C. Concerns for Judicial Economy Compel Upholding Tribal Adjudicatory Jurisdiction ..	15

TABLE OF CONTENTS - Continued

	Page
III. THE INDIAN CIVIL RIGHTS ACT, THE PLEN- ARY POWER OF CONGRESS, AND PRINCI- PLES OF COMITY ASSURE THAT TRIBAL COURTS WILL ACT FAIRLY.....	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Alyeska Pipeline Service Co. v. Kluti Kaah Native Village</i> , ___ F.3d ___, 1996 WL 668487 (9th Cir. 1996).....	4
<i>Allstate Insurance Co. v. Hague</i> , 449 U.S. 302 (1981)	10
<i>Brendale v. Confederated Tribes and Bands</i> , 492 U.S. 408 (1989).....	<i>passim</i>
<i>Burlington Northern R.R. Co. v. Blackfeet Tribe</i> , 924 F.2d 899 (9th Cir. 1991), <i>cert. denied</i> , 505 U.S. 1212 (1992).....	4
<i>Burnham v. Superior Court</i> , 495 U.S. 604 (1990).....	10
<i>Buttz v. Northern Pacific R.R. Co.</i> , 119 U.S. 55 (1886)	3
<i>Confederated Tribes v. Washington</i> , 938 F.2d 146 (9th Cir. 1991), <i>cert. denied</i> , 503 U.S. 997 (1992)	14
<i>County of Yakima v. Confederated Tribes and Bands</i> , 502 U.S. 251 (1992)	4, 7
<i>Duro v. Reina</i> , 495 U.S. 676 (1990).....	9
<i>Fredericks v. Eide-Kirschmann Ford</i> , 462 N.W.2d 164 (N.D. 1990).....	19
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	12
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9 (1987)	<i>passim</i>
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	3, 4, 7, 13, 14
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

Page(s)

<i>National Farmers Union Insurance Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	5, 8, 9, 11, 17
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	11
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	2
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	6, 9
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985) ..	10, 12
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978) ...	17, 18
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993)	3, 7, 9, 11, 13
<i>TXO Prod. Corp. v. Alliance Resources Corp.</i> , 509 U.S. 443 (1993)	5
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	10
<i>Testa v. Katt</i> , 330 U.S. 386 (1947)	10
<i>Three Affiliated Tribes v. Wold Eng'g</i> , 467 U.S. 138 (1984)	6
<i>United States v. Soldana</i> , 246 U.S. 530 (1918)	3
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	6
<i>Washington v. Confederated Tribes</i> , 447 U.S. 134 (1980)	2
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	8, 9, 11
<i>Wilson v. Marchington</i> , 934 F. Supp. 1187 (D.Mont. 1996), appeal docketed, No. 96-35145 (9th Cir. Jan. 30, 1996)	20

TABLE OF AUTHORITIES – Continued

Page(s)

TREATIES, STATUTES, AND CODES

Treaty Between the United States and the Arikara Tribe of July 18, 1825, 7 Stat. 259	5-6
23 U.S.C. §§ 204(j), 402	14
25 U.S.C. §§ 1301-1303	17
25 U.S.C. §§ 3601-3631	18
28 U.S.C. § 1332	6
Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 8(c)	17

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993)	18
S. Rep. No. 88, 103d Cong., 1st Sess. (1993)	18
H.R. 1268, 103d Cong. (1993)	18
S. 2747, 100th Cong. (1988)	18
S. 1752, 102d Cong. (1991)	18

Enforcement of the Indian Civil Rights Act: Hear- ing Before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988)	18
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EXECUTIVE MATERIALS

The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June, 1991)	18
--	----

TABLE OF AUTHORITIES – Continued

Page(s)

COURT RULES

N.D. S. Ct. Rule 7.2..... 19

OTHER AUTHORITY

Ralph J. Erickstad and James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. Rev. 569 (1995)..... 19Darby L. Hoggatt, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 Land & Water L. Rev. 531 (1995)..... 19National Center for State Courts, *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* (1991)..... 19

ARGUMENT

For three separate and alternative reasons, the Tribe's court has jurisdiction, concurrent with the courts of North Dakota, to adjudicate this case. First, the case arose on Indian trust land which, while subject to an easement for a state highway, Congress has neither alienated from the Tribe nor otherwise divested from inherent tribal jurisdiction. *See, e.g., Montana v. United States*, 450 U.S. 544, 557 (1981); *Brendale v. Confederated Tribes and Bands*, 492 U.S. 408 (1989). Second, and quite apart from their authority to impose substantive rules of conduct, tribal courts have jurisdiction to adjudicate civil actions arising within their reservations, even if such claims arise on land which has been alienated from the tribe. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Third, the Tribe has jurisdiction to adjudicate this case simply by virtue of its particularized interest in the outcome: both because the parties all have close, consensual ties to the reservation, and because respondents' allegedly hazardous driving on reservation roads falls within a category of tortious conduct that threatens the welfare of the reservation community.¹ *See Montana*, 450 U.S. at 565-566. Respondents have failed to refute any of these three independent grounds for reversal.

I. ABSENT EXPRESS DIVESTMENT BY CONGRESS, THE TRIBE RETAINS INHERENT CIVIL JURISDICTION OVER THE CONDUCT OF NON-INDIANS ON INDIAN LAND

Respondents and their *amici* improperly conflate two quite distinct categories of land within the territorial

¹ Respondents assert that petitioner Gisela Fredericks was travelling in the wrong lane on the highway before the accident, Resp. Br. at 1, but they fail to acknowledge her argument that she was making a left turn across the lane toward her driveway when her car was hit by respondents' gravel truck.

boundaries of Indian reservations: 1) Indian land, which is owned outright by a tribe or its members or held in trust for them by the United States, and 2) non-Indian fee land or other land whose Indian title has been extinguished by Congress. As this Court has recognized, however, a tribe's interest in exercising its sovereign authority is at its zenith where Indian land is involved. See *Montana*, 450 U.S. at 557; *Brendale*, 492 U.S. at 438-444 (opinion of Stevens, J.) (announcing judgment of Court upholding tribal authority over "closed" Indian lands, as distinct from "open," largely alienated lands); see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331, 335 (1983). For that reason, a tribe's authority to govern non-Indian conduct on Indian land exceeds its authority to govern the same conduct on land which is no longer Indian land. See *Washington v. Confederated Tribes*, 447 U.S. 134, 152-153 (1980) ("Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. . . ."). That principle governs this case.

A. A Federal Grant of an Easement on Indian Trust Land to a State for Highway Purposes Does Not Divest Tribal Jurisdiction over Tortious Conduct by Non-Indians on the Highway

Respondents argue that the federal grant of an easement to the State to maintain a highway on Indian trust land divests the Tribe of "any and all rights, duties or control" over the highway. Resp. Br. at 34. Significantly, respondents cite no express statutory provision for this proposition. Rather, the premise of respondents' argument appears to be that, in granting the easement, Congress intended to divest the Tribe of its entire beneficial interest in the land on which the easement was granted. That premise is false.

With respect to Indian lands, Congress and this Court have long distinguished between grants of limited, non-Indian interests, such as easements, on Indian land and complete divestitures of tribal interests in Indian land. See, e.g., *Buttz v. Northern Pac. R.R. Co.*, 119 U.S. 55, 68 (1886) (Congress first "obtain[ed] from the Indians the right to construct railroads . . . across their lands . . . and afterwards . . . obtain[ed] a cession of their entire title" to the same lands). As *Buttz* makes clear, the two actions – granting a right-of-way and extinguishing title – are separate and distinct. This distinction is made largely because of the different jurisdictional consequences that attach to each action. See *United States v. Soldana*, 246 U.S. 530, 531-532 (1918).

It is undisputed that the highway in this case is situated on land held in trust for the Tribe and members of the Tribe. Because the Tribe retains its beneficial ownership of the land, the easement has no bearing either on federal protection or jurisdiction, see *United States v. Soldana*, 246 U.S. at 531-533, or on tribal sovereignty over the conduct of non-Indians, see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-144 (1982) (non-Indian lessees on tribal land are subject to taxation by the tribe); *Brendale*, 492 U.S. at 439-440 (opinion of Stevens, J.) ("the fact that nonmembers may now drive on these roads does not . . . undermine the Tribe's historic and consistent interest" in exercising regulatory authority over conduct on the surrounding lands); cf. *South Dakota v. Bourland*, 508 U.S. 679, 688-692 (1993) (curtailing tribal sovereignty with respect to land in which a tribe no longer has a legal or beneficial interest and over which the United States Army has assumed complete authority).

Respondents' amici base their contrary view on the contention that the Tribe cannot exclude non-Indians

from the highway. *E.g.*, States' Br. at 5, 15-17. That argument, however, confuses two distinct sources of tribal authority. A tribe's inherent sovereign powers and its treaty-guaranteed right to exclude non-Indians are each adequate and independent grounds for assertions of tribal authority over non-Indians. *Merrion*, 455 U.S. at 136-137, 141; *Brendale*, 492 U.S. at 425 (opinion of White, J.); *Brendale*, *id.* at 439-440 (opinion of Stevens, J.). This case involves a tribe's inherent sovereignty over conduct on unalienated Indian trust lands, not the interpretation of treaty rights that ensure a tribe's power to exclude non-Indians altogether. Indeed, this Court has explicitly affirmed that a tribe retains regulatory authority over the conduct of non-Indians on tribal land, even where it lacks or has forgone the right to exclude them. *Merrion*, 455 U.S. at 137-148; *see also Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 903 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (tribe may tax railroad on right-of-way through reservation), *cited with approval in Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Village*, ___ F.3d ___, 1996 WL 668487, at *4 (9th Cir. 1996); *see also Bourland*, 508 U.S. at 691 (declining to reach the "ultimately irrelevant" treaty-based issue concerning a tribe's power to exclude because "the Army Corps of Engineers, not the Tribe," had assumed complete "regulatory control over the taken area").

The fact that the easement holder here is the State does not alter the proper analysis. With respect to Indian land, a state acquires only such rights and interests as have been specifically granted by Congress. *See County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251 (1992). Here the State was granted a limited easement to pave and maintain a 6.59 mile stretch of Highway 8 within the Reservation. It was not given exclusive authority to regulate conduct on that road. The Tribe's retention

of sovereign jurisdiction over tortious conduct on the highway is entirely consistent with Congress' limited purpose in granting the easement. In short, in granting the public access through Indian trust lands, Congress did not intend to, and did not need to, forever insulate the public from tribal court liability for negligent misconduct.

B. The Tribe's Treaties and Agreements with the United States do not Divest Tribal Civil Jurisdiction over Non-Indian Conduct on the Reservation

In their brief at pp. 14-23, respondents argue – for the first time in any forum – that the "historical record" of treaties and agreements between the Tribe and the United States shows Congress' express intent to divest the Tribe of jurisdiction over this case. This argument was neither raised in nor reached by the tribal courts, and therefore has not been exhausted pursuant to *Iowa Mutual*, 480 U.S. at 16-17, and *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). Indeed, there are few matters more essential for a tribal court to review in the first instance than the proper construction of a tribe's own treaties and agreements with the United States. For that reason, and because respondents' "historical record" arguments were not presented to or passed on by the federal courts below. *see generally TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 444 (1993), these arguments are not properly before this Court.

In any event, respondents' historical arguments are untenable. The treaty and agreement provisions with the Tribe deal with what could only be equated with criminal jurisdiction over non-Indians – the Tribe's power to exact "revenge or retaliation" for "injuries done by individuals" – not civil jurisdiction over tort suits between non-Indians. *See Treaty Between the United States and the*

Arikara Tribe of July 18, 1825, 7 Stat. 259; compare *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribes lack criminal jurisdiction over non-Indians), with *National Farmers*, 471 U.S. at 853-855 (refusing to extend the *Oliphant* rule or the *Oliphant* historical analysis to tribal court jurisdiction over civil litigation involving non-Indians). Moreover, even if these treaty and agreement provisions had some bearing on civil jurisdiction, which they do not, providing for federal assistance in obtaining redress would be entirely consistent with non-federal adjudicatory jurisdiction over civil cases. See *Iowa Mutual*, 480 U.S. at 17-18 (federal diversity statute, 28 U.S.C. § 1332, does not divest tribal courts of jurisdiction over reservation-based civil claims between tribal members and non-members); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 150-151 & n.9 (1984) (even before enactment of Public Law 280, nothing in federal law barred North Dakota courts from adjudicating civil action brought by this Tribe against non-Indians).²

Despite respondents' contrary assertion, Resp. Br. at 15 & 23, it is irrelevant that Congress has never specifically granted the Tribe civil jurisdiction over cases involving two non-Indians. Inherent tribal sovereignty does not depend on a delegation of federal power. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Rather, the burden is on the party challenging inherent tribal sovereignty to show that Congress has expressly divested it.

² Here, tribal jurisdiction is coextensive with that of North Dakota. See Opening Br. at 24; see also J.A. 63-64 (district court below implied that tribal jurisdiction is concurrent with state court jurisdiction). Petitioner Gisela Fredericks recently filed a similar action in state court to protect her rights against the running of the State's six-year statute of limitations, in the event that tribal jurisdiction is determined not to exist over her claims. See Resp. Br. at 8 n.6.

Iowa Mutual, 480 U.S. at 18; *Bourland*, 508 U.S. at 687; see also *County of Yakima*, 502 U.S. at 269 ("ambiguous provisions" of statutes should be resolved in favor of tribes).³ As discussed above, respondents have not made that showing here. Also misconceived is respondents' contention (see Br. at 18 & n.15) that, until recently, the Tribe had not exercised its full jurisdiction over civil actions involving non-Indians. As this Court has held, tribes do not lose their sovereign powers through non-use. See *Merrion*, 455 U.S. at 148 ("sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms").

II. ALTERNATIVELY, EVEN IF THE SITE OF THE ACCIDENT WERE NOT INDIAN LAND, THE TRIBE RETAINS ADJUDICATORY JURISDICTION OVER THIS CASE

Even if the site of the accident in this case could be analogized to the lands wholly alienated from the tribes in *Montana*, *Brendale*, and *Bourland*, the Court of Appeals' decision should still be reversed for two independent reasons. First, this Court's precedents indicate that tribal courts have authority to exercise adjudicatory jurisdiction over civil actions involving non-Indians and arising on a reservation whether or not they also have the authority to regulate those non-Indians' conduct with substantive

³ Respondents are therefore incorrect (see Resp. Br. at 18-19) in asserting that the "parties' expectations," govern the jurisdictional analysis. See also *Merrion*, 455 U.S. at 147. Moreover, respondents, with their close contractual ties to the Reservation, were on clear notice that they could be held subject to tribal court jurisdiction, which, several years before the accident, this Court deemed "presumptively" appropriate in cases involving non-Indians and arising on a reservation. *Iowa Mutual*, 480 U.S. at 18.

rules. Second, and in any event, the circumstances of this case meet each alternative prong of the *Montana* "tribal interest test," which permits a tribe to exercise regulatory authority (and, *a fortiori*, adjudicatory jurisdiction) over non-Indian conduct on the reservation, "even on non-Indian fee lands." *Montana*, 450 U.S. at 565-566.

A. The Tribe Has Adjudicatory Jurisdiction over the Case Whether or Not it may Impose Tribal Law as the Substantive Rule of Decision

Respondents and their *amici* devote much of their argument to an issue that the Court has already resolved: the appropriateness of tribal courts as fora for adjudicating the rights of non-Indians on Indian reservations. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court affirmed the exclusive jurisdiction of tribal courts to hear civil actions brought by a non-Indian against an Indian for matters arising on a reservation. The Court deemed it "immaterial" that the plaintiff whose rights were at stake in that case "[wa]s not an Indian." 358 U.S. at 223. What mattered, the Court held, was that the non-Indian "was on the Reservation and the transaction with an Indian took place there." *Id.* Significantly, the Court based its decision in *Williams v. Lee* not on any showing of a particularized tribal interest in the outcome of that specific dispute, *cf.* *Montana*, 450 U.S. at 565-566, but on a categorical rule "guard[ing] the authority of Indian governments over their reservations." 358 U.S. at 223.

More recently, in *Iowa Mutual* and *National Farmers*, the Court required non-Indian parties who were defendants in reservation-based tribal court proceedings to exhaust tribal remedies before seeking federal court review of tribal jurisdiction. That exhaustion requirement would make no sense unless tribal courts actually have broad jurisdiction to resolve reservation-based disputes

involving non-Indians. See *National Farmers*, 471 U.S. at 854 ("If we were to apply the *Oliphant* rule here [barring tribal criminal jurisdiction over non-Indians], it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians"). Thus, the Court logically based its decision in *Iowa Mutual* on the principle that, because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18 (citations omitted); accord *National Farmers*, 471 U.S. at 854. This passage is not, as respondents contend, Resp. Br. at 27, "*dictum*," but an essential element of the Court's holding. Respondents correctly observe that, in some contexts, the Court has recognized limits on the power of tribes to impose substantive rules of conduct on non-Indians, whether through substantive regulation of their conduct on alienated lands, see *Bourland*, 508 U.S. at 688-692, *Brendale*, 492 U.S. at 426-428 (plurality opinion), *Montana*, 450 U.S. at 563-564, or through criminal prosecution, see *Duro v. Reina*, 495 U.S. 676 (1990), *Oliphant*, 435 U.S. at 197-212. Despite respondents' contrary view, however, these cases do not undermine the separate principle, affirmed in *Iowa Mutual*, *National Farmers*, and *Williams v. Lee*, that tribal jurisdiction to adjudicate reservation-based civil disputes involving non-Indians is presumed.

There are at least two reasons why a sovereign's inherent authority to adjudicate disputes among non-residents or non-members is often broader than its separate power to apply its own substantive rules of conduct

as the rule of decision.⁴ First, unlike the power to regulate, which is often compromised by the need to avoid conflicts with another sovereign's laws, a sovereign's authority to offer a forum for the resolution of civil disputes arising within its territory is so integral to the definition of sovereignty that it has become one of "the most firmly established principles of personal jurisdiction in American tradition." *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion); see also *Iowa Mutual*, 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government").

Second, the interest of a non-resident or a non-member in avoiding the exercise of a sovereign's adjudicatory jurisdiction is much more attenuated than the separate interest in avoiding application of that sovereign's substantive laws. Thus, under due process principles, the contacts between a forum state and a non-resident litigant must be significantly greater to justify application of forum law than to justify a state's bare exercise of jurisdiction to resolve the dispute under, for example, the laws of the non-resident's own state. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Similarly, state courts have expansive inherent authority to adjudicate disputes presenting issues that, under federal law, the states themselves could not substantively regulate through either positive or judge-made law. See generally *Tafflin v. Levitt*, 493 U.S. 455 (1990); *Testa v. Katt*, 330 U.S. 386 (1947).

⁴ While petitioner Gisela Fredericks is not a member of the Tribe, respondents misstate (see Br. at 1 n.2) her residency. The correct position is the one alleged by respondents themselves in their complaint in federal district court: Gisela Fredericks is indeed a resident of the Reservation. J.A. 42.

Hence, the distinction that respondents ask the Court to reject – a distinction between adjudicatory jurisdiction and the power to impose substantive rules of conduct – already pervades the Court's jurisprudence governing the proper role of state courts within the federal system. Likewise, the Court has viewed tribal adjudicatory jurisdiction over civil actions involving non-Indians as broader than a tribe's power to impose substantive rules of conduct on non-Indians. Indeed, this is one reason why there is no conflict between the Court's cases affirming broad tribal adjudicatory jurisdiction over non-Indians, see *Iowa Mutual*, *National Farmers*, and *Williams v. Lee*, and its separate decisions imposing constraints on a tribe's substantive power to regulate non-Indian conduct, see *Bourland*, *Brendale*, and *Montana*.⁵ Here, because only the threshold issue of adjudicatory jurisdiction is presently before the Court, the adjudicatory jurisdiction cases govern the proper analysis. See Br. of United States at 21-22, 25 n.14.

B. The Montana "Tribal Interest Test" Standing Alone Justifies the Tribal Court's Exercise of Adjudicatory Jurisdiction in the Case

Even if a tribe's authority to adjudicate disputes were coextensive with its authority to impose substantive rules of conduct, the tribal court could exercise both forms of

⁵ Tribal court application of the substantive law of a given state would pose no threat to principles of state sovereignty. Although a tribal court's interpretation of state law might not be subject to review outside the tribal court system, it is similarly true that, when one state applies the substantive law of another state, the latter state has no opportunity to review the former state's interpretation of its law. See generally *Nevada v. Hall*, 440 U.S. 410 (1979).

authority in this case. Under *Montana*, tribes may substantively regulate (and, *a fortiori*, adjudicate disputes between) non-Indians, even with respect to non-Indian fee lands, pursuant to the Montana "tribal interest test." That test affirms a tribe's authority to regulate non-Indians either where they "enter consensual relationships with the tribe or its members," or where their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566. Each prong of that test is met here.

The *Montana* tribal interest test is closely analogous to the due process inquiry governing whether a non-resident has sufficient contacts with a forum state to justify the application of that state's substantive law. Quite beyond the "minimum contacts" necessary to exercise personal jurisdiction, see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a state may apply its own law in a judicial proceeding against non-residents only if it "ha[s] a significant contact or significant aggregation of contacts to the claims" of those non-residents sufficient to "creat[e] state interests" and to ensure that the choice of [forum] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821. The *Montana* tribal interest test accomplishes a similar objective: to ensure that substantive tribal law is imposed not necessarily on all non-Indians merely present on or passing through a reservation, but only on those who either "enter consensual relationships with the tribe or its members" or engage in conduct that threatens tribal well-being. *Montana*, 450 U.S. at 565-566.⁶

⁶ Without authority, respondents' amici argue that a consensual relationship must be express. *E.g.*, Br. of American Trucking Association, *et. al.*, at 14. But this Court has never equated the consensual relationship prong with a requirement

This case fits squarely within each of these categories. With respect to "consensual relationships" with the Tribe, it is undisputed that respondents deliberately chose to contract with a tribal company to help develop a tribal community center on the reservation.⁷ During their extensive dealings on the Reservation, respondents benefited from "the provision of police protection and other

of express consent. See *Montana*, 450 U.S. at 565; see also *Merrion*, 455 U.S. at 147 (consent "has little if any role in measuring the exercise of legitimate sovereign authority"). Nor does such a requirement make sense in the realm of tort law, since few tortfeasors expressly consent beforehand to the application of any particular sovereign's substantive laws or to any particular court's jurisdiction over their tortious conduct.

Similarly, respondents' amici argue that, after *Brendale*, a "direct effect" on tribal well-being can never "provide a basis for direct tribal authority over non-consenting nonmembers." States' Br. at 24-29. That is a misreading even of the *Brendale* plurality opinion, which did not command a majority of the Court. Properly read, the *Brendale* plurality noted that if a direct effect on tribal well-being sufficient to sustain substantive tribal regulation of a non-Indian's conduct is lacking, a tribe nevertheless may have other remedies by which to protect its rights, such as actions in the federal or state courts. 492 U.S. at 430-431. But the "direct effect" prong, which affirms a tribe's sovereign authority to take action on its own, remains a valid test. See *Bourland*, 508 U.S. at 695-696 (remanding for application of the direct effect prong).

⁷ Respondents argue, Resp. Br. at 40, that the tribal court was somehow divested of jurisdiction over the underlying action in this case by a provision in the subcontract that, according to respondents, "provides for adjudication of disputes between A-1 and [the tribal company] under Utah law in Utah courts." Assuming that the subcontract is part of the record, *but see* J.A. at 111 n.5, the provision at issue is irrelevant to this case, which involves tortious conduct by respondents against third parties on the reservation, not a contractual dispute between respondents and the tribal company.

governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-138 (internal quotation marks omitted). Where an individual or company actively seeks out and benefits from tribal society, simple fairness suggests that it should be held accountable under generally applicable principles of tribal law. *See id.*

This case meets *Montana's* "direct effect" prong as well. *See* 450 U.S. at 566. This is not a tort action alleging conduct, such as the invasion of one non-Indian's privacy by another, that, viewed *ex ante*, never posed a direct threat to the well-being of the Tribe or its members. Nor is this a routine dispute between, for example, non-Indian residents of a reservation over a contract for work to be performed off the reservation. In such cases, a tribal court with adjudicatory jurisdiction over the dispute might lack a sufficient interest in the outcome to justify application of its own substantive law.

The tortious conduct in this case, by contrast – hazardous driving on reservation roads – imperils anyone present on these roads, Indians as well as non-Indians. Just as a tribe may enact reasonable ordinances ensuring the safety of such roads, *see, e.g., Confederated Tribes v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992), so too may a tribe enforce substantive safe-driving principles through application of its own tort law in the course of its adjudication.⁸ Few rules of conduct are as integral to the well-being of any community as prohibitions on dangerous driving. Denying a tribe the

⁸ Congress has recently confirmed tribal authority over planning for, maintenance of, and safety on reservation roads. The Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C. §§ 204(j), 402.

authority to enforce such prohibitions through positive or judge-made law would strip the *Montana* "direct effect" prong of much of its independent significance. In sum, even if the Tribe were required to demonstrate a particularized interest in the outcome of this case to justify its exercise of adjudicatory jurisdiction – a showing that no other sovereign need make in analogous circumstances and that this Court's precedents do not require – the Tribe has made that showing here.

C. Concerns for Judicial Economy Compel Upholding Tribal Adjudicatory Jurisdiction

As they must, respondents implicitly acknowledge, *Resp. Br.* at 42-44, that the *Montana* tribal interest test alone would sometimes permit a tribal court to apply substantive tribal law in reservation-based civil actions involving non-Indians. For that reason, even if respondents' narrow theory of tribal court jurisdiction were correct, the tribal interest test would also permit a tribal court to exercise adjudicatory jurisdiction over such cases. That fact illustrates why it would make little practical sense to bar a tribal court from exercising general adjudicatory jurisdiction over civil disputes between non-Indians arising out of conduct on a reservation.

Under respondents' approach, a tribal court presented with an action against a non-Indian would have to determine – as part of its threshold jurisdictional inquiry – whether the *Montana* tribal interest test is met. If so, a tribal court could exercise adjudicatory jurisdiction and apply substantive tribal law in resolving the action. If not, the tribal court would have to dismiss the case for lack of jurisdiction. By its nature, however, the tribal interest test is fact-specific. Questions may arise, for example, about the nature or existence of a non-Indian

defendant's contract with tribal parties, or about whether a non-Indian's tortious conduct posed (or poses) a safety threat not just to other non-Indians on the reservation, but to tribal members as well.⁹

In many cases, therefore, a tribal court could not conduct the preliminary tribal interest inquiry without also conducting a detailed inquiry into the merits of the parties' claims. Under respondents' approach, a tribal court that conducts such an inquiry and determines that the tribal interest test is not met would then have to dismiss the action altogether, thereby forcing the parties to relitigate their claims from the beginning in another forum. That result would be exceptionally wasteful. By contrast, if the tribal interest test is relevant only to a tribal court's choice of substantive law and not to its jurisdiction, a tribal court that deems the test unsatisfied would still be free to complete its resolution of the dispute under the law of another sovereign. Thus, because the facts relevant to the tribal interest test are generally also relevant to the merits of the parties' claims, this Court's principle that a sovereign's adjudicatory authority often exceeds its regulatory powers is the better means of conserving judicial resources, no less in tribal court actions than in state court litigation.

⁹ For example, respondents argue that the record is unclear about whether respondent Lyle Stockert was performing the subcontract when he was driving the gravel truck that collided with petitioner Gisela Fredericks' car. Resp. Br. at 40-41. Such a factual issue is relevant to the merits of claims and relief sought and may also be relevant to tribal jurisdiction under the tribal interest test.

III. THE INDIAN CIVIL RIGHTS ACT, THE PLENARY POWER OF CONGRESS, AND PRINCIPLES OF COMITY ASSURE THAT TRIBAL COURTS WILL ACT FAIRLY

Respondents' *amici* suggest that tribal courts "are inherently ill-suited to provide a fair and impartial forum for the adjudication of substantial tort claims against outsiders." Br. of the American Trucking Association, *et al.*, at 2.¹⁰ This sweeping statement ignores this Court's observation ten years ago that challenges to tribal court competency to adjudicate reservation-based civil actions involving non-Indians contradict "congressional policy," *Iowa Mutual*, 480 U.S. at 19, and this Court's own repeated affirmations of tribal court jurisdiction over both Indians and non-Indians, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

As the Court recognized in *Santa Clara Pueblo*, tribal courts are bound by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which guarantees, *inter alia*, the due process and equal protection rights of both Indians and non-Indians. 436 U.S. at 60-61; *see also National Farmers*, 471 U.S. at 856 n.21 (noting that exhaustion of the federal question of tribal court jurisdiction over non-Indians is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to

¹⁰ Respondents make a similar allegation, and, in so doing, misread the Tribe's Law and Order Code regarding eligible jurors. Resp. Br. at n.9. The Code specifically provides that otherwise qualified 1) enrolled tribal members and 2) residents of the Reservation are eligible to serve on juries in the Tribal Court. Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 8(c).

challenge the court's jurisdiction") (internal quotation marks omitted).

Since *Santa Clara Pueblo*, Congress and the Executive Branch have examined in depth the fairness and competency of tribal courts nationwide. See *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights*, 100th Cong., 2d Sess. (1988); *The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights* (June, 1991). In virtually every session, Congress considers legislation affecting tribal courts. E.g., S. 2747, 100th Cong. (1988) (to provide federal court authority to enforce rights secured by the Indian Civil Rights Act); S. 1752, 102d Cong. (1991) (to provide for the development, enhancement, and recognition of Indian tribal courts); H.R. 1268, 103d Cong. (1993) (to assist the development of tribal judicial systems).

The most recent culmination of this process is the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993), wherein Congress, rather than curtailing tribal court jurisdiction, authorized important additional resources for its effective exercise. See also Br. of United States at 4 (describing recent Department of Justice initiatives regarding tribal courts). In authorizing these resources, Congress acted on the premises, affirmed by this Court in *Iowa Mutual*, 480 U.S. at 18, that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals," S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993), and "that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993). Of course, Congress is free to reverse course and do what respondents urge this Court to do: carve out exceptions to a tribe's

inherent, sovereign authority to adjudicate civil actions involving non-Indians. Congress has not done so, however, because there is no need for it to do so.

Further, a tribal court judgment against a non-Indian is rarely effective unless the successful plaintiff can persuade a federal or state court to enforce that judgment.¹¹

¹¹ North Dakota uses comity principles to enforce tribal court judgments. *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164, 171 (N.D. 1990). To date, at least thirteen other states have addressed issues of enforcing tribal court judgments. See Darby L. Hoggatt, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 Land & Water L. Rev. 531, ns.11-14 (1995). In addition, nationwide efforts between tribal courts and state courts have focused on "cross-recognition of judgments, final orders, laws and public acts between tribal, state, and federal courts." National Center for State Courts, *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* 5 (1991). Significantly, one of the recommendations made in the *National Agenda* is that "[i]t should be a goal of all concerned for Indian tribes to have some jurisdiction, at their option and as their resources permit, over conduct in Indian country, whether by Indian tribal members, non-members, or non-Indians." *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* 5.

Following this national project, "[t]he North Dakota Supreme Court . . . sought and received direct funding from the State Justice Institute to establish a forum project in North Dakota. With the experiences of the previous forum projects to draw upon and with the shared goal of reducing conflict and achieving greater understanding, the North Dakota Tribal/State Court Forum was formed and began its work in January, 1993." Ralph J. Erickstad and James Ganje, *Tribal and State Courts - A New Beginning*, 71 N.D. L. Rev. 569, 573 (1995). The Forum proposed a tribal court order and judgment recognition rule that was adopted by the North Dakota Supreme Court in 1995. N.D. S. Ct. Rule 7.2.

Since most courts review tribal court judgments under the principles of comity applicable to the enforcement of foreign judgments, successful enforcement of tribal judgments generally requires a showing that the underlying tribal proceedings were full, fair, and non-discriminatory. *See Wilson v. Marchington*, 934 F.Supp. 1187, 1193 (D.Mont. 1996), *appeal docketed*, No. 96-35145 (9th Cir. Jan. 30, 1996); *see generally* Br. of United States at 6. That requirement, which is inapplicable to the enforcement of state court judgments, forecloses any concern that tribal courts are not up to the task that Congress and this Court have secured for them.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 95-1872

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE,
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v.

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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a non-Indian plaintiff against a non-Indian contractor, hired to do tribal business on the reservation, arising out of an accident that occurred on tribal lands.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	13
Argument:	
I. Civil adjudicatory jurisdiction over reservation affairs, including disputes between non-Indians arising on a reservation, presumptively lies in the tribal courts in the absence of a contrary treaty or Act of Congress	15
II. Even if the <i>Montana</i> analysis were applicable to a tribal court's adjudicatory jurisdiction over non-Indians, the tribal court would still have jurisdiction over this dispute	24
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Allstate Ins. Co. v. Hague</i> , 449 U.S. 302 (1981)	21
<i>Barrett v. Barrett</i> , 878 P.2d 1051 (Okla. 1994)	6
<i>Brendale v. Confederated Tribes & Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989)	22, 25
<i>Burlington Northern R.R. v. Blackfeet Tribe</i> , 924 F.2d 899 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992).....	26
<i>Burnham v. Superior Court</i> , 495 U.S. 604 (1990)	19-20
<i>Carroll v. Lanza</i> , 349 U.S. 408 (1955)	20, 28
<i>Confederated Tribes of Colville Reservation v. Washington</i> , 938 F.2d 146 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992)	28
<i>Custody of Sengstock, In re</i> , 477 N.W.2d 310 (Wis. Ct. App. 1991)	6

IV

Cases—Continued:	Page
<i>Duncan Energy Co. v. Three Affiliated Tribes</i> , 27 F.3d 1294 (8th Cir. 1994), cert. denied, 115 S. Ct. 779 (1995)	8
<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	1, 16, 18
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991)	8
<i>Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.</i> , 462 N.W.2d 164 (N.D. 1990)	6
<i>Gesinger v. Gesinger</i> , 531 N.W.2d 17 (S.D. 1995)	6
<i>Hartford Fire Ins. Co. v. California</i> , 509 U.S. 764 (1993)	21
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895)	6
<i>Hinshaw v. Mahler</i> , 42 F.3d 1178 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994)	27
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	20
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	passim
<i>Jones v. Meehan</i> , 175 U.S. 1 (1899)	21
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984)	20, 22, 28
<i>Kennerly v. District Court</i> , 400 U.S. 423 (1971)	16
<i>Leeper v. Leeper</i> , 319 A.2d 626 (N.H. 1974)	20
<i>Marriage of Red Fox, In re</i> , 542 P.2d 918 (Or. Ct. App. 1975)	6
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	15, 19, 26, 29
<i>Mexican v. Circle Bear</i> , 370 N.W.2d 737 (S.D. 1985)	6
<i>Middlemist v. Babbitt</i> , 19 F.3d 1318 (9th Cir.), cert. denied, 115 S. Ct. 420 (1994)	18
<i>Montana v. United States</i> , 450 U.S. 544 (1981) ..	passim
<i>National Farmers Union Ins. Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	1, 10, 14, 17, 18, 22
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	28

V

Cases—Continued:	Page
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	15, 25
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	18
<i>Ortiz-Barraza v. United States</i> , 512 F.2d 1176 (9th Cir. 1975)	26, 27
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	21, 23
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	23
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	2, 5, 16, 26
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977)	21
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993) ..	22, 25
<i>State v. Begay</i> , 320 P.2d 1017 (N.M.), cert. denied, 357 U.S. 918 (1958)	26
<i>State v. Schmuck</i> , 850 P.2d 1332 (Wash.), cert. denied, 510 U.S. 931 (1993)	27, 28
<i>State v. Webster</i> , 338 N.W.2d 474 (Wis. 1993)	26, 27, 28
<i>Stock West Corp. v. Taylor</i> , 964 F.2d 912 (9th Cir. 1992)	22, 23
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	23
<i>Testa v. Katt</i> , 330 U.S. 386 (1947)	23
<i>Three Affiliated Tribes v. Wold Engineering, P.C.</i> : 467 U.S. 138 (1984)	5, 17
476 U.S. 877 (1986)	17
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	15
<i>United States v. McBratney</i> , 104 U.S. 621 (1881) ..	17
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983)	26
<i>United States v. Shoshone Tribe</i> , 304 U.S. 111 (1938)	26
<i>United States v. Tsosie</i> , 92 F.3d 1037 (10th Cir. 1996)	18

VI

Cases—Continued:	Page
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	15
<i>United States ex rel. Morongo Band of Mission Indians v. Rose</i> , 34 F.3d 901 (9th Cir. 1994)	25
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	18, 22, 29
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	15
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	5, 16
<i>Wilson v. Marchington</i> , 934 F. Supp. 1187 (D. Mont. 1996)	5, 6, 7
<i>Wippert v. Blackfeet Tribe</i> , 654 P.2d 512 (Mont. 1982)	6
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832) ...	15
<i>Yellow Freight Sys., Inc. v. Donnelly</i> , 494 U.S. 820 (1990)	17
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996)	24, 25
Statutes, regulations and rules:	
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280)	5, 17
Act of Nov. 6, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (25 U.S.C. 1301(2))	16
American Indian Agricultural Resource Management Act, 25 U.S.C. 3713(c)	6
Indian Child Welfare Act of 1978, 25 U.S.C. 1901 <i>et seq.</i>	4
25 U.S.C. 1911(a)	4
25 U.S.C. 1911(d)	6
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 <i>et seq.</i>	3, 16
25 U.S.C. 1301-1311	3
25 U.S.C. 1301(2)	16
25 U.S.C. 1321(a)	5
25 U.S.C. 1322(a)	5, 17
25 U.S.C. 1326	5

VII

Statutes, regulations and rules—Continued:	Page
Indian Reorganization Act, 25 U.S.C. 461 <i>et seq.</i> :	
25 U.S.C. 461-479	7
25 U.S.C. 476-479	2
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 <i>et seq.</i> :	
25 U.S.C. 450	2
25 U.S.C. 450a	2
Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004	3
25 U.S.C. 3601 <i>et seq.</i>	16, 18
25 U.S.C. 3601	1
25 U.S.C. 3601(4)-(6)	3
25 U.S.C. 3601(5)	2
25 U.S.C. 3611-3614	3
25 U.S.C. 3621(b)	3
National Indian Forest Resources Management Act, 25 U.S.C. 3106(c)	6
12 U.S.C. 1715z-13(g)(5)	5
18 U.S.C. 2265	6
25 U.S.C. 323-328	26
28 U.S.C. 1331	10
28 U.S.C. 1345	18
N.M. Stat. Ann. § 40-13-6(D) (Michie 1994)	7
Okla. Stat. Ann. tit. 12, § 728 (West Supp. 1997)	7
S.D. Codified Laws Ann. § 1-1-25(1) (1992)	6
Wis. Stat. Ann. § 806.245(4) (West 1994)	6
Wyo. Stat. § 5-1-111(d) (1977)	6
Sisseton-Wahpeton Tribal Code, ch. 33, § 1 (1982)	21
Three Affiliated Tribes Code § 2.5(4) (1982)	21
25 C.F.R.:	
Section 161.18 (1970)	7
Section 169.18 (1996)	7
Mich. Ct. R. 2.615(C)	6
N.D. Ct. R. 7.2(b)	7

Miscellaneous:	Page
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1942)	21
Comment, <i>Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act</i> , 45 Emory L.J. 723 (1996)	5
DOJ Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996)	4
H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993)	3-4, 19
H.R. Rep. No. 205, 103d Cong., 1st Sess. (1993)	4
Sandra Hansen, <i>Survey of Civil Jurisdiction in Indian Country 1990</i> , 16 Am. Indian L. Rev. 319 (1991)	5
Hon. Sandra Day O'Connor, <i>Lessons from the Third Sovereign: Indian Tribal Courts</i> , 9 Tribal Ct. Rec. 12 (1996)	2
Frank Pommersheim, <i>Braid of Feathers: American Indian Law and Contemporary Tribal Life</i> (1995) .	21
<i>Powers of Indian Tribes</i> , 55 Interior Dec. 14 (1934) .	21
Janet Reno, <i>A Federal Commitment to Tribal Justice Systems</i> , 79 Judicature 113 (1995)	4
S. Rep. No. 88, 103d Cong., 1st Sess. (1993)	3
Joseph Story, <i>Commentaries on the Conflict of Laws</i> (1846)	20
R. Strickland, et. al., <i>Felix S. Cohen's Handbook of Federal Indian Law</i> (1982)	2
<i>Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs</i> , 104th Cong., 1st Sess. (1995)	2
U.S. Dep't of Interior, Bureau of Indian Affairs, <i>Budget Justifications, F.Y. 1997</i> (1996)	2
United States Comm'n on Civil Rights, <i>The Indian Civil Rights Act</i> (1991)	2

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v.

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INTEREST OF THE UNITED STATES

The United States is committed to the principles of self-determination and self-government of Indian Tribes. See, e.g., 25 U.S.C. 3601; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). Central to tribal sovereignty is the effectiveness of tribal institutions, including tribal courts. See *ibid.* The United States has consistently participated as *amicus curiae* in cases, such as this one, implicating the authority of those courts. See, e.g., *Duro v. Reina*, 495 U.S. 676 (1990); *Iowa Mutual*, *supra*; *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

STATEMENT

1. Many Indian Tribes have formal tribal court systems to adjudicate disputes arising on their reservations. See generally United States Commission on Civil Rights, *The Indian Civil Rights Act* 29-31 (1991); R. Strickland, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 332-335 (1982). Today, "tribal justice systems are an essential part of tribal governments." 25 U.S.C. 3601(5); accord *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). Their number has grown sharply in the last 20 years: from 117 in 1976, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978), to more than 230 today, see U.S. Dep't of Interior, Bureau of Indian Affairs, *Budget Justifications, F.Y. 1997*, at BIA-57 (1996). At the same time, the number of cases on tribal court dockets has steadily increased, accompanied by corresponding advances in the professional qualifications of tribal judges and lawyers.¹

a. Tribal courts owe much of their present stature to comprehensive federal assistance designed to ensure their role as appropriate forums for adjudication of disputes arising on Indian reservations. See *Santa Clara Pueblo*, 436 U.S. at 65; see, e.g., 25 U.S.C. 450, 450a (Indian Self-Determination and Education Assistance Act, providing funding and assistance for tribal government institutions, including courts), 476-479 (Indian Reorganization Act,

¹ See Testimony of Hon. William Canby, Chair of the Ninth Circuit Judicial Task Force on Tribal Courts, *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. 58 (1995) ("Tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago."); see also Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 9 Tribal Ct. Rec. 12, 12 (1996) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

providing for establishment of tribal governments), 1301-1311 (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing "bill of rights," and providing for development of model code of Indian offenses for Indian courts).

In 1993, Congress reaffirmed the United States' commitment to tribal courts by enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004, which establishes an Office of Tribal Justice Support within the Bureau of Indian Affairs, see 25 U.S.C. 3611-3614, and authorizes an annual appropriation of up to \$50 million to support the Office's assistance to tribal courts, see 25 U.S.C. 3621(b). The Act rests on, *inter alia*, the following congressional findings (25 U.S.C. 3601(4)-(6)):

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights.

As the Senate Report explained, "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). The Indian Tribal Justice Act also reflects Congress's understanding "that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf.

Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mutual*, 480 U.S. at 18).²

The Department of Justice has also played an important role in fostering the development of tribal courts. See generally DOJ Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 Judicature 113 (1995) (symposium on tribal courts). For example, in conjunction with the Federal Judicial Center, the Department of Justice has developed a joint training program for tribal and federal judges on the adjudication of child sexual abuse cases in Indian country. The Department has also designated 45 tribal governments for "Tribal Court-DOJ Partnership Projects," under which local United States Attorneys' offices will provide training for tribal court personnel. See Reno, 79 Judicature at 114.

b. The proficiency of tribal courts in handling complex litigation has led Congress to recognize their jurisdiction to adjudicate important questions of federal law. For example, Congress has affirmed the exclusive jurisdiction of tribal courts to resolve many disputes under the Indian Child Welfare Act of 1978, see 25 U.S.C. 1911(a), and, except in habeas corpus proceedings, to enforce the provisions of the Indian Civil Rights Act, which (among other guarantees) protects the procedural rights of any party to

² See also H.R. Rep. No. 205, 103d Cong., 1st Sess. 8-9 (1993) ("As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court. * * * The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'") (quoting *Iowa Mutual*, 480 U.S. at 18).

tribal court proceedings. See *Santa Clara Pueblo v. Martinez*, *supra*; see also 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against reservation home owners in either tribal court or federal district court). Similarly, Congress's long-standing effort to ensure "the authority of the tribal courts over Reservation affairs," *Williams v. Lee*, 358 U.S. 217, 223 (1959), is also manifest in federal legislation requiring tribal consent before a State may assume civil jurisdiction over reservation-related disputes in which an Indian is a defendant.³

Perhaps the best evidence of the stature and sophistication of tribal courts is the frequency with which the judgments of those courts are enforced—whether by statute or under principles of comity—in state and federal courts. Most courts agree that no federal statute generally requires full faith and credit for tribal judgments, see *Wilson v. Marchington*, 934 F.Supp. 1187, 1189-1190 (D. Mont. 1996); Comment, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 Emory L.J. 723, 757-761 (1996); see also cases cited in note 4, *infra*,

³ Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, gave five States (not including North Dakota, in which this case arose) jurisdiction over civil and criminal actions involving Indians and arising in Indian country. As amended in 1968, federal law gives all other States the option of assuming similar jurisdiction after receiving tribal consent. See 25 U.S.C. 1321(a), 1322(a), 1326. No Tribe in North Dakota has given such consent. See *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) (*Three Affiliated Tribes I*); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. 319, 336 n.124 (1991). As this Court held in *Three Affiliated Tribes I*, federal law does not bar a state court from exercising jurisdiction over a suit brought by an Indian against a non-Indian in a State that has not assumed jurisdiction pursuant to Public Law 280.

although Congress has imposed full-faith-and-credit requirements for specific categories of adjudication, see, *e.g.*, 18 U.S.C. 2265 (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders), 3106(c) (enforcement of National Indian Forest Resources Management Act), 3713(c) (enforcement of American Indian Agricultural Resource Management Act).

Even in the absence of a federal statute specifically requiring full faith and credit, however, state and federal courts have regularly enforced tribal court judgments under principles of comity that incorporate the standards governing the enforcement of foreign court judgments. See *Wilson*, 934 F. Supp. at 1191-1193.⁴ Under those principles, a court may condition enforcement of a tribal court's judgment upon a determination that the tribal proceedings were full, fair, and impartial, see *ibid.* (citing *Hilton v. Guyot*, 159 U.S. 113, 202 (1895)), and consistent with the enforcing jurisdiction's public policy, see generally *Mexican v. Circle Bear*, 370 N.W.2d 737, 740-741 (S.D. 1985) (same). Moreover, several States have codified similar comity standards by rule or statute.⁵ Cf. *Wilson*, 934 F.

⁴ Accord *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett v. Barrett*, 878 P.2d 1051 (Okla. 1994); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); see also *Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982).

⁵ See, *e.g.*, Wis. Stat. Ann. § 806.245(4) (West 1994) (state court may examine, *inter alia*, whether tribal court judgment was procured without fraud, duress or coercion; in compliance with the rendering court's procedures; and in compliance with the Indian Civil Rights Act); Wyo. Stat. § 5-1-111(d) (1977) (same); S.D. Codified Laws Ann. § 1-1-25(1) (1992) (party seeking recognition must demonstrate, *inter alia*, that tribal court judgment was obtained after fair notice and fair hearing and is not repugnant to public policy of State); Mich. Ct. R. 2.615(C) (objecting party may resist enforcement by demonstrating,

Supp. at 1191-1193 (applying such standards as matter of federal common law).

2. a. This declaratory judgment action challenges the jurisdiction of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation over a tort suit between non-Indians arising out of an accident on the Tribes' Reservation in west-central North Dakota. In November 1990, an automobile driven by petitioner Gisela Fredericks collided with a gravel truck driven by respondent Lyle Stockert and owned by respondent A-1 Contractors. The accident occurred on a state highway that was constructed under the authority of a right-of-way granted by the Secretary of the Interior and lies on lands held by the United States in trust for the Tribes and their members.⁶ The Three Affiliated Tribes (collectively, the Tribe) are federally recognized Indian Tribes that exercise inherent sovereignty over their members and lands under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. 461-479. See Pet. App. 2-3 & n.2.

Neither Fredericks nor Stockert is an Indian. Fredericks, however, is the widow of a deceased member of the Tribe, has five children who are likewise tribal members,

inter alia, that tribal court judgment was obtained without fair notice or fair hearing or is repugnant to public policy of State); N.D. Ct. R. 7.2(b) (same); see also Okla. Stat. Ann. tit. 12, § 728 (West 1996); N.M. Stat. Ann. § 40-13-6(D) (Michie 1994) (full faith and credit for tribal court protection orders).

⁶ In the federal district court proceedings, petitioners alleged that "[t]he state highway runs through trust lands on the reservation pursuant to a federal right-of-way granted under 25 U.S.C. §§ 323-28." Tribal Defendants' Brief in Support of Cross-Motion for Summary Judgment, May 20, 1992, at 26. Respondents have not contested that allegation. Cf. Pet. App. 77 ("The only factual dispute is whether Gisela Fredericks resides on the reservation."). The right-of-way at issue was in the nature of an easement. See 25 C.F.R. 161.18 (1970), redesignated as 25 C.F.R. 169.18 (1996).

owns property on the Reservation, and (according to petitioners, the tribal courts, and the Eighth Circuit) resides there. Pet. 4; Pet. App. 2-3, 74, 89, 102, 104. A-1 Contractors is owned by non-Indians and is based in Dickinson, North Dakota. At the time of the accident, A-1 was working on the Reservation under a subcontract agreement with LCM Corporation, which is wholly owned by the Tribe. A-1 was engaged in the construction of a tribal community building, and it performed all work under the subcontract within the boundaries of the Reservation. *Id.* at 3.⁷

Fredericks suffered serious injuries in the collision. In May 1991, she sued respondents (and A-1's insurer, which was later dropped from the suit) in the Tribe's trial court. As part of the same litigation, her adult children sued respondents for loss of consortium. Respondents entered a special appearance and moved to dismiss the suit on the ground that the tribal court lacked personal and subject-matter jurisdiction. Pet. App. 3-4.

b. The tribal court denied the motion to dismiss. Pet. App. 101-109. The court first held that, as a matter of tribal law, it had personal and subject-matter jurisdiction under the Tribal Code, which authorizes tribal jurisdic-

⁷ According to the federal court of appeals, the record is not clear whether Stockert was engaged in work under the subcontract at the time of the collision. See Pet. App. 3 & n.1. The tribal courts, however, resolved the jurisdictional issue on the premise that he was, see Pet. App. 89, 93, 96, 102-103, 105-106, and there is no indication of any other reason why he would have been driving a gravel truck on the Reservation. See generally *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (federal courts should extend deference to tribal court factual determinations relevant to tribal court jurisdiction), cert. denied, 499 U.S. 943 (1991); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) (same), cert. denied, 115 S. Ct. 779 (1995).

tion over "all civil causes of action arising within the exterior boundaries of the Reservation" and over "all persons who reside, enter, or transact business within the territorial boundaries of the Reservation." *Id.* at 104.

The tribal court then rejected respondents' argument that federal law—and, in particular, this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981)—required a different result. *Montana*, the court reasoned, limits the extent to which a Tribe may regulate the activities of non-Indians on alienated fee lands owned by non-Indians; it does not constrain tribal court jurisdiction over disputes arising from activities on reservation lands that have not been alienated from a Tribe. Pet. App. 105. Alternatively, the court held that, even if the underlying accident had occurred on alienated fee lands, Fredericks' claims would still constitute "precisely the type" of civil action that the *Montana* Court deemed "subject to Tribal jurisdiction," *id.* at 106: both because torts within a reservation have "a direct effect on the economic security, health and welfare of the Tribe[] and its members," and because "the tort alleged in the Complaint arises out of the Defendant's consensual business activity within the Reservation." *Id.* at 105-106 (citing *Montana*, 450 U.S. at 565-566).⁸

c. Respondents took an interlocutory appeal of the jurisdictional ruling to the Northern Plains Intertribal Court of Appeals, which affirmed. Pet. App. 87-100. That court agreed with the trial court's determination that the

⁸ Neither the tribal court nor any other court has reached the question of the tribal court's jurisdiction over the consortium claims brought by Fredericks' adult children, who are tribal members. See Pet. App. 107. The tribal court's jurisdiction over those claims is therefore not before this Court, even though the pendency of those claims makes it at least possible that, if this case is permitted to proceed in tribal court, some of the parties will be members of the Tribe.

Tribe's legislative code and constitution vested the tribal court with personal and subject-matter jurisdiction in this case. *Id.* at 94-95. The court further held that whether the Tribe has authority under federal law to exercise civil adjudicatory jurisdiction over non-Indians is controlled, not by *Montana*, but by *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which held that civil jurisdiction over the activities of non-Indians on a reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. "Like any sovereign," the court explained, the Tribe "has an interest in providing a forum for peacefully resolving disputes that arise in [its] geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction." Pet. App. 93. The Intertribal Court of Appeals therefore remanded the case to the trial court for further proceedings. *Id.* at 97.

3. Before proceedings resumed in tribal court, respondents filed this action in the United States District Court for the District of North Dakota. Respondents sought a declaratory judgment that the tribal court lacked personal and subject-matter jurisdiction as a matter of federal law, as well as an injunction against further proceedings in tribal court. The complaint named Fredericks, her adult children, the tribal court judge (Hon. William Strate), and the tribal court itself as defendants. Both sides moved for summary judgment.

a. The district court granted summary judgment for petitioners. Pet. App. 73-86. As a preliminary matter, the court held that it had jurisdiction over respondents' action under 28 U.S.C. 1331, and that respondents had exhausted their tribal court remedies before seeking relief in federal court. Pet. App. 74. See generally *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). The district court also concluded that the case was ripe for

summary judgment because the parties' only factual dispute concerned the status of Fredericks' residency on the Reservation, an issue that respondents had not raised in tribal court and that the district court deemed immaterial. Pet. App. 77. The district court then held that the tribal court's assumption of jurisdiction complied with federal law because, under *Iowa Mutual*, "Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute." *Id.* at 82.

b. Respondents appealed to the United States Court of Appeals for the Eighth Circuit on one issue only: whether the tribal court could exercise subject-matter jurisdiction over Fredericks' claim. A divided panel of the court of appeals affirmed the district court. Pet. App. 50-72.

The panel held that "the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians," Pet. App. 59, a circumstance not presented here. Thus, because "no specific treaty provision or federal statute has been shown to have affirmatively limited the power of the tribal courts over civil actions that arise on the reservation between non-Indians," the panel concluded that, under *Iowa Mutual's* "presumpti[on]" of tribal court jurisdiction, see 480 U.S. at 18, the Tribe had authority to adjudicate the underlying tort suit. Pet. App. 61.

In the alternative, the panel held that, even if *Montana's* limits on tribal sovereignty were applicable, this case would fall within each of the two categories of activities as to which "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Pet. App. 56 (quoting *Montana*, 450 U.S. at 565-566). First, the panel found that "a 'consensual relationship' existed between appellants and the tribe by virtue of

the subcontract between A-1 and LCM Corp.," and that "[t]he allegedly tortious conduct * * * occurred in connection with the performance of the subcontract on the reservation." *Id.* at 61 (quoting *Montana*, 450 U.S. at 565). Second, the panel held that the Tribe's exercise of adjudicatory jurisdiction followed from its sovereign power to protect "the health and safety of its members and residents on the roads and highways on the reservation." *Id.* at 62-63. Finally, the panel observed that the tribal court's yet-unmade choice-of-law determination was irrelevant to the jurisdictional inquiry: "Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum." *Id.* at 63.

c. On rehearing en banc, the Eighth Circuit reversed the judgment of the district court, holding that the tribal court lacked subject-matter jurisdiction over Fredericks' suit. Pet. App. 1-48.

The en banc court held that *Montana* governs a tribal court's jurisdiction over civil disputes between nonmembers arising on a reservation. Pet. App. 8. In the court's view, *Montana* established a "general principle that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" regardless of where those activities take place on the reservation. *Ibid.* (quoting *Montana*, 450 U.S. at 565). The court rejected petitioners' separate arguments that the *Montana* analysis restricts tribal authority only with respect to non-Indian activities on non-Indian fee lands, *id.* at 15, and only with respect to the enforcement of substantive rules of conduct, as distinguished from the adjudication of civil disputes, *id.* at 16-18.

The en banc court acknowledged, but deemed inapplicable, the two situations in which *Montana* permits the

exercise of tribal authority over non-Indians. As to *Montana*'s provision for tribal regulation of those who enter into "consensual relationships" with the Tribe, see 450 U.S. at 565, the court held that "[t]he dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit of" A-1's subcontract with the Tribe. Pet. App. 21. And as to *Montana*'s provision for tribal regulation of non-Indian activities with a "direct effect" on tribal welfare, see 450 U.S. at 566, the court concluded that petitioners "completely failed to show that the tribe's ability to govern or protect its own members would be directly damaged if the tribe cannot assert jurisdiction over this lawsuit." Pet. App. 24.

Four judges dissented from the Eighth Circuit's holding. Pet. App. 24-48.

SUMMARY OF ARGUMENT

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and civil jurisdiction over those activities thus "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Because no treaty provision or Act of Congress has withdrawn that aspect of the Tribe's sovereignty here, the tribal court properly exercised jurisdiction over the underlying tort suit. That exercise of jurisdiction comports with this Court's consistent recognition that tribal courts are appropriate forums for adjudicating the rights of non-Indians in civil disputes arising on reservation lands, just as state courts are appropriate forums for adjudicating the rights of non-residents in civil disputes arising within each State.

That the tribal court may exercise adjudicatory jurisdiction over this dispute does not necessarily mean that the tribal court should apply tribal law, as opposed to North Dakota state law, as its substantive rule of decision. That choice-of-law question, analogous to similar issues commonly resolved by state courts exercising adjudicatory jurisdiction over disputes between non-residents, is appropriately addressed to the tribal court in the first instance, cf. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and is not now before this Court. For that reason alone, this case is distinguishable from *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. Those cases limit only the scope of a Tribe's power to impose substantive rules of conduct on non-Indians, not a tribal court's power to adjudicate disputes under substantive rules—whether arising under tribal, state, or federal law—that are consistent with *Montana* and applicable choice-of-law principles.

This case is distinguishable from *Montana* for a second reason as well. Like its progeny, *Montana* does not restrict, and in fact reaffirms, the inherent power of Tribes to regulate the conduct of non-Indians on tribal lands: i.e., lands owned by, or held in trust for, the Tribe or its members. See 450 U.S. at 557. The only tribal power that *Montana* limits is the authority to regulate non-Indian activities on alienated reservation lands owned in fee simple by non-Indians. See *id.* at 557, 563. In this case, by contrast, petitioner Fredericks' claim arose on a road, maintained by the State pursuant to a right-of-way granted by the Secretary of the Interior, that lies on land held in trust for the Tribe and its members.

Finally, even if the tribal court's exercise of adjudicatory jurisdiction constituted a form of substantive regulation, which it does not, and even if the accident occurred on non-Indian fee lands, which it did not, tribal court jurisdic-

tion over this case would still comport with *Montana*. In that case, this Court recognized that a Tribe may regulate the activities of non-Indians, "even on non-Indian fee lands," in at least two circumstances: where the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-566. Each of those circumstances is presented here. This case involves not just the Tribe's general authority to adjudicate claims of hazardous driving on reservation roads, but, more specifically, the Tribe's ability to adjudicate claims of hazardous driving by commercial enterprises that, like A-1, "avail themselves of the substantial privilege of carrying on business on the reservation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982) (internal quotation marks omitted).

ARGUMENT

I. CIVIL ADJUDICATORY JURISDICTION OVER RESERVATION AFFAIRS, INCLUDING DISPUTES BETWEEN NON-INDIANS ARISING ON A RESERVATION, PRESUMPTIVELY LIES IN THE TRIBAL COURTS IN THE ABSENCE OF A CONTRARY TREATY OR ACT OF CONGRESS

A. Indian Tribes are sovereign political entities with inherent jurisdiction "over both their members and their territory." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), and *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); accord *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). For that rea-

son, this Court recognizes that tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), and it has likewise rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987), and to this Court's precedents, see *Santa Clara Pueblo*, 436 U.S. at 65-66; see also 25 U.S.C. 3601 *et seq.*

This Court has therefore upheld the exercise of tribal court civil jurisdiction in a variety of contexts affecting the rights of non-Indians.⁹ It has held that tribal courts have exclusive jurisdiction to adjudicate a non-Indian's legal rights against Indians for matters arising on a reservation, see *Williams v. Lee*, 358 U.S. 217 (1959); see also *Kennerly v. District Court*, 400 U.S. 423 (1971) (*per curiam*), and (except in habeas corpus proceedings) to enforce the federal guarantees, applicable both to Indians and to non-Indians, of the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*, see *Santa Clara Pueblo*, 436 U.S. at 65-66. Moreover, to ensure "comity" among courts and to "[p]romot[e] * * * tribal self-government and self-determination," this Court has required non-Indian defendants in tribal court suits to exhaust tribal remedies before challenging the jurisdiction of the tribal court in

⁹ In some contexts, Indian parties who do not belong to the Tribe whose authority they resist may stand in the same legal position as non-Indian parties. See, e.g., *Duro v. Reina*, 495 U.S. 676 (1990); cf. Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892, 25 U.S.C. 1301(2) (post-*Duro* legislation defining "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians"). Because no non-member Indians are involved in this lawsuit, this brief simply distinguishes between Indian and non-Indian parties.

federal court. See *Iowa Mutual*, 480 U.S. at 15; *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). That requirement presupposes that a tribal court often may, in fact, exercise jurisdiction against non-Indian defendants (even where they resist it) to adjudicate disputes arising on the reservation; indeed, this Court made clear that such disputes "presumptively" lie within tribal jurisdiction. See *Iowa Mutual*, 480 U.S. at 18.¹⁰

¹⁰ It seems clear that the state courts in North Dakota also would have jurisdiction over the underlying tort suit. In *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984), this Court held that a state court has jurisdiction over a suit brought by the Tribe itself against a non-Indian arising out of a contract for construction work on the Reservation. It follows *a fortiori* that a state court would have jurisdiction over a suit against a non-Indian where the plaintiff is also a non-Indian. Cf. *United States v. McBratney*, 104 U.S. 621 (1881) (State, rather than United States, had jurisdiction to prosecute criminal offense committed by one non-Indian against another non-Indian in Indian country). That premise also underlies Public Law 280 (see note 3, *supra*), which provides for "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State" to assume such jurisdiction, with the consent of the Tribe. See 25 U.S.C. 1322(a). The absence of a provision in Public Law 280 for States to assume jurisdiction over disputes to which Indians are *not* parties indicates that the States already had that jurisdiction.

The existence of state court jurisdiction does not, however, suggest that tribal courts do not also have jurisdiction over such a dispute. Concurrent jurisdiction is common in many contexts, see, e.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990), and this Court has recognized that state and tribal courts may have concurrent jurisdiction over suits against non-Indian defendants for matters arising on the Reservation, see *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 888-889 (1986). Accordingly, nothing in federal law would have barred petitioner Fredericks from suing respondents in state court in the first instance. In the case of an ordinary private civil dispute that does not itself challenge the exercise of power by the tribal government—and where there is not already a case pending in the

By contrast, tribal courts lack criminal jurisdiction over non-Indians. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); see also *Duro v. Reina*, 495 U.S. 676 (1990). But the scope of a tribal court's civil jurisdiction "is not similarly restricted," *Iowa Mutual*, 480 U.S. at 15, both because criminal prosecution "involves a far more direct intrusion on personal liberties" than does an exercise of civil jurisdiction, *Duro*, 495 U.S. at 687-688, and because Congress has manifested an interest to preserve broader tribal authority over civil cases than over criminal cases, see *National Farmers Union*, 471 U.S. at 854-855 & nn.16-17 (Indian Tribes retain broad inherent sovereignty with respect to civil, but not criminal, matters); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (similar); see also 25 U.S.C. 3601 *et seq.*

B. This case is similar to *Iowa Mutual* and *National Farmers Union* in that all three cases involve challenges by non-Indian defendants to tribal court jurisdiction.

tribal court arising out of the same dispute—we do not believe that *National Farmers Union* or *Iowa Mutual* displaces the usual rule that a plaintiff may select the forum in which the suit will be filed. By contrast, where a private plaintiff challenges an exercise of taxing or regulatory authority by the Tribe itself, we believe that the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. See, e.g., *Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 115 S. Ct. 420 (1994). Where the United States is the plaintiff, we do not believe that prior resort to tribal forums is necessary even in that situation. But see *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (affirming dismissal under "exhaustion" doctrine of ejectment action brought by United States in federal district court under 28 U.S.C. 1345 against individual Indian occupying land allotted by United States to another Indian, even where no parallel action was pending against United States in tribal court and where no such action could be brought in tribal court without waiver of United States' sovereign immunity there).

Here, however, the plaintiff invoking tribal court jurisdiction is also a non-Indian. The question presented is therefore not whether tribal courts may exercise civil jurisdiction over non-consenting non-Indians—this Court's decisions in *Iowa Mutual* and *National Farmers Union* rest on the premise that tribal courts often do have such jurisdiction, see *Iowa Mutual*, 480 U.S. at 18—but whether the absence of an Indian party divests a tribal court of jurisdiction over a civil dispute arising in Indian country.

In our view, *Iowa Mutual* provides the answer to that question. There, this Court held that, because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty[,] [c]ivil jurisdiction over such activities *presumptively lies in the tribal courts* unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18 (emphasis added; citations omitted). Congress also understood that to be the operative presumption when it enacted the Indian Tribal Justice Act in 1993. See H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoted on p. 3, *supra*). That presumption governs this case. We are not aware of, and the parties have not cited, any treaty provision or Act of Congress that impairs the Tribe's sovereign authority to adjudicate disputes arising on the Reservation. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact." *Iowa Mutal*, 480 U.S. at 18 (ellipses omitted) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)).

Indeed, the power to adjudicate disputes arising within territorial limits is a defining attribute of sovereignty. Justice Story's maxim that "every nation may . . . rightfully exercise jurisdiction over all persons within its domains," *Burnham v. Superior Court*, 495 U.S. 604, 611

(1990) (plurality opinion) (quoting J. Story, *Commentaries on the Conflict of Laws* §§ 554, 543 (1846)), has become one of "the most firmly established principles of personal jurisdiction in American tradition," *id.* at 610. Similarly, "[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974)); see also *Carroll v. Lanza*, 349 U.S. 408 (1955).

Like a State, an Indian Tribe has "an especial interest" in exercising civil jurisdiction to deter and remedy wrongful conduct within its territory. That interest is particularly strong where, as here, both the perpetrators and the victims of the conduct at issue have close ties to the reservation and the tribal community. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Just as one State may provide a forum for the adjudication of civil disputes arising within that State between citizens of another State, so too does a Tribe retain sovereign authority to exercise jurisdiction (concurrent with that of the State, see note 10, *supra*) over civil disputes arising within the reservation between non-Indians.

C. That a tribal court may exercise adjudicatory jurisdiction over such suits does not necessarily mean that, in any given case, the Tribe would or could impose its own substantive law as the rule of decision. Under traditional choice-of-law principles, courts of one sovereign often adjudicate disputes using the substantive law of another sovereign. That practice reflects the constitutional principle that a sovereign's adjudicatory jurisdiction commonly exceeds its power to impose substantive rules of

conduct. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-814 (1993) (Scalia, J., dissenting in part); cf. *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977).¹¹

Here, the tribal courts have not addressed whether state or tribal law (or both) would be applicable in the substantive resolution of the underlying tort suit.¹² That

¹¹ Felix S. Cohen, *Handbook of Federal Indian Law* (1942), states that, in fields in which a Tribe has legislative or executive authority, "the judicial powers of the tribe are coextensive with its legislative or executive powers." *Id.* at 145; accord *Powers of Indian Tribes*, 55 Interior Dec. 14, 56 (1934). Those sources do not state that the existence of executive or legislative authority is a necessary condition for a Tribe's exercise of adjudicatory jurisdiction over civil disputes involving non-Indians.

¹² It is, for example, an open question whether the Tribe's law (in the absence of applicable federal choice-of-law requirements) would authorize the tribal court to apply state law as the rule of decision. Many tribal codes expressly authorize application of state law in tribal proceedings. See, e.g., Sisseton-Wahpeton Tribal Code, ch. 33, § 1 (1982) (quoted in Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 228 n.119 (1995)); cf. *Jones v. Meehan*, 175 U.S. 1, 28-32 (1899) (application of tribal law in federal proceedings). By contrast, Section 2.5(4) of the Code of the Three Affiliated Tribes provides that "[s]tate and federal laws not applicable to the Three Affiliated Tribes or the Fort Berthold Reservation shall not be deemed applicable law in any proceeding." That language leaves unresolved not only which "state laws" are "not applicable to the * * * Tribes," but also the extent to which a tribal court may incorporate the substance of state law to fill interstices in tribal law. Moreover, for the reasons discussed in the text, federal law may require tribal courts to apply state law in certain contexts, notwithstanding tribal law to the contrary. See p. 23, *infra*. There is no suggestion in this case that federal law would furnish the rules of decision in the adjudication of the underlying tort suit. Where federal law does govern the underlying conduct, tribal courts, like state courts, must apply federal law.

choice-of-law issue, which is properly resolved by the tribal courts in the first instance, see generally *National Farmers Union, supra*; *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc), is not now before this Court. Moreover, because that issue "presents itself in the course of litigation only after jurisdiction over respondent[s] is established, * * * choice-of-law concerns should [not] complicate or distort the jurisdictional inquiry." *Keeton*, 465 U.S. at 778.

For that reason alone, this case is distinguishable from *Montana v. United States*, 450 U.S. 544 (1981), and its progeny: *South Dakota v. Bourland*, 508 U.S. 679 (1993), and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). *Montana*, *Bourland*, and *Brendale* each addressed the scope of a Tribe's power to enact substantive rules governing the conduct of non-Indians on alienated reservation lands owned in fee simple by non-Indians. In each case, this Court held that, as a matter of federal common law, a Tribe presumptively lacks that power except where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or where the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-566; cf. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153-154 (Tribes retain inherent powers to tax "non-Indians entering the reservation to engage in economic activity").

Montana and its progeny therefore restrict a Tribe's power to regulate non-Indians; they do not address a Tribe's distinct power to adjudicate disputes involving non-Indians. Analogously, constitutional restrictions on a State's power to impose substantive rules of conduct on

non-residents do not themselves limit the State's independent authority to adjudicate disputes between non-residents under the laws of other States or of the United States. See, e.g., *Shutts*, 472 U.S. at 821-822; see also *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Testa v. Katt*, 330 U.S. 386 (1947). The *Montana* analysis is therefore applicable to tribal court proceedings only insofar as it restricts a tribal court's authority to impose substantive tribal law on non-Indians. See generally *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief"). Specifically, with respect to conduct on alienated fee lands, *Montana* would generally require a tribal court to apply state law to the conduct of non-Indian defendants unless the tribal court determines that imposition of tribal law would be more appropriate either because the defendants have "enter[ed] consensual relationships with the tribe or its members" or because their conduct could have some "direct effect" on the Tribe's well-being. See 450 U.S. at 565-566.¹³

Montana does not, however, restrict the adjudicatory jurisdiction of a tribal court to resolve disputes arising on a reservation under substantive rules of decision that are

¹³ Arguably, a tribal court's choice-of-law determination, to the extent that it implicates the federal legal principles set forth in *Montana*, could be subject to review in federal court once tribal remedies are exhausted. Such review would ensure enforcement of those principles without unduly threatening the sovereignty of tribal courts. Cf. *Iowa Mutual*, 480 U.S. at 19 ("proper deference to the tribal court system" bars relitigation of merits issues, but not jurisdictional issues, already resolved in tribal court); *Stock West Corp.*, 964 F.2d at 920 (abstaining from choice-of-law determination relevant to jurisdictional issue because that determination should be undertaken by tribal court "in the first instance").

consistent with *Montana*'s restrictions on the scope of a Tribe's law-making authority. That is why in *Iowa Mutual*, decided several years after *Montana*, this Court perceived no tension between *Montana* and the principle that civil adjudicatory jurisdiction over non-Indians "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. But see *Yellowstone County v. Pease*, 96 F.3d 1169, 1175-1176 (9th Cir. 1996) (following Eighth Circuit's decision on this point).

II. EVEN IF THE MONTANA ANALYSIS WERE APPLICABLE TO A TRIBAL COURT'S ADJUDICATORY JURISDICTION OVER NON-INDIANS, THE TRIBAL COURT WOULD STILL HAVE JURISDICTION OVER THIS DISPUTE

Even if a tribal court's exercise of adjudicatory jurisdiction were deemed equivalent (for purposes of the *Montana* analysis) to the imposition of substantive tribal law, the tribal court in this case would nonetheless retain jurisdiction over the underlying suit.

A. In the absence of a contrary treaty or Act of Congress, an Indian Tribe retains plenary sovereign authority, both legislative and adjudicatory, over all Indian and non-Indian activities on tribal lands—i.e., lands owned by, or held by the United States in trust for, the Tribe or its members. For that reason, the *Montana* Court sustained a Tribe's inherent authority to regulate hunting and fishing by non-Indians on tribal lands. 450 U.S. at 557. The Court invalidated those regulatory measures only to the extent that the Tribe sought to enforce them against non-Indian hunting or fishing on alienated reservation lands that non-Indians held in fee simple. *Id.* at 559-560 & n.9.

This Court has subsequently applied the *Montana* presumption only against tribal regulation of non-Indian activities on alienated fee lands. It has never applied that presumption to restrict tribal regulation of non-Indian activities on tribal lands, in which a Tribe retains a core sovereignty interest. See *Bourland, supra* (invalidating tribal regulation of non-Indian activities on land alienated from Tribe for flood control purposes); *Brendale, supra* (invalidating tribal zoning ordinances as applied to most fee lands owned by non-members, but upholding those ordinances as applied to "closed" reservation area consisting of federal trust lands and scattered fee lands); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) (invalidating application of state law to on-reservation activities of non-Indians because, "[u]nlike this case, *Montana* concerned lands located within the reservation but not owned by the Tribe or its members"); see also *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); but cf. *Yellowstone County*, 96 F.3d at 1174-1175.

For that reason, even if the Tribe's regulatory authority (as distinguished from its adjudicatory jurisdiction) were at issue in this case, the *Montana* presumption against the exercise of that authority over non-Indians would be inapplicable.¹⁴ According to petitioners' unrebut-

¹⁴ In our view, therefore, federal law would likely permit the tribal court, if it so chooses, to apply the Tribe's substantive law in the underlying tort suit, and any suggestion to the contrary in the court of appeals' analysis of *Montana* (as part of the court's disposition of the jurisdictional issue) was erroneous. In any event, for the reasons discussed in Part I above, the tribal court's subject-matter jurisdiction

ted claim, see note 6, *supra*, the road on which the automobile accident at issue occurred lies on tribal trust lands, not on alienated fee lands. To be sure, that road is a state highway created pursuant to a federally authorized right-of-way. But that right-of-way does not divest the Tribe of its beneficial ownership in the trust lands over which the right-of-way runs, see generally *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938), and the Act of Congress authorizing the right-of-way, 25 U.S.C. 323-328, cannot be construed to impair the powers of tribal sovereignty that follow from the Tribe's beneficial ownership. See *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60 (absent "clear indications" of contrary congressional intent, Act of Congress should be construed to preserve tribal sovereignty). As discussed above, those powers include the Tribe's plenary authority to regulate the conduct of non-Indians on tribal lands. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 136-144 (Tribe has power to tax non-Indians on tribal lands even where Tribe lacks power to exclude them); *Burlington Northern R.R. v. Blackfoot Tribe*, 924 F.2d 899 (9th Cir. 1991) (railroad right-of-way through trust land did not divest Tribe of its power to tax activities of non-Indians on tribal lands), cert. denied, 505 U.S. 1212 (1992); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) (state "[r]ights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police"); *State v. Webster*, 338 N.W.2d 474, 479-480 (Wis. 1983) (right-of-way for state highway does not extinguish tribal interest in underlying land); *State v. Begay*, 320 P.2d 1017 (N.M.) (same), cert. denied, 357 U.S. 918 (1958); see also *United States v. Mitchell*, 463 U.S. 206, 223-225 (1983).

does not turn on resolution of the federal principles delimiting the tribal court's choice-of-law determination.

B. Finally, even if the tribal court's exercise of adjudicatory jurisdiction over disputes involving non-Indians could be equated with substantive regulation of non-Indians' primary conduct, and even if the road on which the accident occurred could be equated with alienated fee land owned by non-Indians, the tribal court still would have jurisdiction over the underlying tort suit. In *Montana*, this Court noted that a Tribe may impose substantive rules of conduct on the activities of non-Indians—"even on non-Indian fee lands"—in at least two circumstances: where non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-566. This case presents both of those circumstances.

First, the tribal court correctly determined that vehicular negligence, "as alleged in the Complaint, certainly * * * has a direct effect on the economic security, health and welfare of the Tribe[] and its members." Pet. App. 105-106. Indeed, few matters would appear more appropriate for substantive regulation by any sovereign than protection of its own citizens against tortious conduct. See *Webster*, 338 N.W.2d at 482 (upholding tribal interest in regulating traffic on state right-of-way crossing through reservation); *State v. Schmuck*, 850 P.2d 1332 (Wash.) (Tribes have inherent sovereign power, under *Montana* "direct effects" test, to stop and detain non-Indian drivers suspected of drunk driving on public right-of-way crossing through reservation), cert. denied, 510 U.S. 931 (1993); see also *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994); *Ortiz-Barraza*, 512 F.2d at 1179-1180. If (as we believe) a Tribe may post and enforce speed limits against all drivers on reservation roads, see

Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *Webster*, 338 N.W.2d at 482, it may also deter and remedy dangerous vehicular conduct through adjudication of civil disputes. See p. 23, *supra*.

The court of appeals appeared to hold that, for purposes of establishing a tribal court's jurisdiction over a tort committed by a non-Indian on a reservation, the *Montana* "direct effects" test requires a showing that the tort's ultimate victim happened to be an Indian, even if the type of tortious conduct at issue poses a broad threat to anyone on the reservation, Indian or non-Indian. Pet. App. 21-24. That is incorrect. If *Montana* were construed to bar a Tribe from regulating a category of tortious acts whose threat to the common tribal welfare is fully apparent only when those acts are viewed in the aggregate, the "direct effects" exception would effectively prohibit the Tribe from enforcing uniform safe-driving standards throughout its Reservation. But all sovereigns, including Indian Tribes, have an inherent interest in deterring (and remedying) negligent acts that make the sovereign's territory a more dangerous place to live and work. See *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (affirming State's "substantial" interest in "providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents") (internal quotation marks omitted); *Schmuck*, 850 P.2d at 1341; *Webster*, 338 N.W.2d at 482; see also *Carroll v. Lanza*, 349 U.S. 408 (1955) (affirming State's authority to apply its own substantive law in adjudicating tort suit between non-residents arising out of injuries sustained within State); see generally *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 776.

Second, even if the Tribe lacked authority to regulate all traffic on highways crossing through tribal land, it

would nonetheless retain the power to regulate the conduct of those who have established "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Here, respondent A-1 Contractors entered into a subcontract agreement with a tribally owned company, and A-1's performance under that agreement took place exclusively within reservation boundaries. At the time of the accident, A-1's employee, respondent Lyle Stockert, was driving a gravel truck that A-1 operated on the Reservation, apparently for use in the construction project. See note 7, *supra*.

Despite those facts, however, the court of appeals found the "consensual relationship" test inapplicable because the subject matter of the underlying tort suit does not "aris[e] under the terms of, out of, or within the ambit of" A-1's subcontract with the Tribe. Pet. App. 21. That position is without merit. A Tribe has plenary authority to regulate non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation"—who, like the Tribe's own members, "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137-138 (internal quotation marks omitted); see also *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153-154. Those who do business on the Reservation cannot reasonably expect to enjoy those benefits without also submitting to the Tribe's authority to apply evenhanded rules of conduct to everyone, Indians and non-Indians alike, who have chosen to take part in reservation life.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court, U.S.

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**In The
Supreme Court of the United States
October Term, 1996**

THE HONORABLE WILLIAM STRATE, ASSOCIATE
TRIBAL JUDGE OF THE TRIBAL COURT OF THE
THREE AFFILIATED TRIBES OF THE FORT BERTHOLD
INDIAN RESERVATION; THE TRIBAL COURT OF THE
THREE AFFILIATED TRIBES OF THE FORT BERTHOLD
INDIAN RESERVATION; LYNDON BENEDICT
FREDERICKS; KENNETH LEE FREDERICKS; PAUL
JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS;
JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**BRIEF AMICUS CURIAE OF THE NORTHERN
PLAINS TRIBAL JUDGES ASSOCIATION
IN SUPPORT OF PETITIONERS**

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16 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. THE COURT'S DECISION BELOW THAT EVERY EXERCISE OF TRIBAL COURT SUBJECT MATTER JURISDICTION OVER A CAUSE OF ACTION INVOLVING A NON-INDIAN OR A NON-MEMBER INDIAN SHOULD BE SUBJECT TO THE CRITERIA SET OUT IN MONTANA V. UNITED STATES, NOTWITHSTANDING THE CAUSE OF ACTION ARISING ON INDIAN LAND, IS UNPRECEDENTED AND WILL IMPAIR IMPORTANT FEDERAL AND TRIBAL INTERESTS.....	2
II. THE LOWER COURT'S OPINION, INsofar AS IT EQUATES NON-INDIANS WITH NON-MEMBER INDIANS, IS UNNECESSARY DICTA WHICH THIS COURT SHOULD DISABUSE.....	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

<i>A-1 Contractors v. Strate</i> , 76 F.3d 930 (8th Cir. 1996) (en banc).....	<i>passim</i>
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987).....	11
<i>Howe v. Ellenbecker</i> , 774 F.Supp. 1224 (D.S.D. 1992), aff'd 8 F.3d 1258 (8th Cir. 1993)	7
<i>In Interest of M.L.M.</i> , 529 N.W.2d 184 (N.D. 1995)	8
<i>McKenize County Social Services Board v. V.G.</i> , 392 N.W.2d 399 (N.D. 1986), cert. denied, 480 U.S. 930 (1987)	8
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	3
<i>Montana v. United States</i> , 450 U.S. 544 (1981)...2, 3, 5, 6, 9	
<i>National Farmer's Union Insurance Co. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985).....	3
<i>Nelson v. Dubois</i> , 232 N.W.2d 54 (N.D. 1975).....	8
<i>Northwest Production Credit Association v. Smith</i> , 784 F.2d 323 (8th Cir. 1985).....	4
<i>Red Fox v. Hettich</i> , 494 N.W.2d 638 (S.D. 1993)	5
<i>South Dakota v. Bourland</i> , 39 F.3d 868 (8th Cir. 1994) ..6, 11	
<i>Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering</i> , 476 U.S. 877 (1986).....	8
<i>United States v. Plainbull</i> , 957 F.2d 724 (9th Cir. 1992).....	4, 6
<i>United States v. Sioux Nation</i> , 448 U.S. 371 (1980)	10
<i>United States v. Tsosie</i> , 92 F.3d 1037 (10th Cir. 1996) ...4, 6	

TABLE OF AUTHORITIES - Continued

Page

STATUTES:

18 U.S.C. Section 1165	6
18 U.S.C. Section 2262	4
18 U.S.C. Section 2265	4
25 U.S.C. Section 483a	4
25 U.S.C. 1911(a)	4, 7
28 U.S.C. 1738B.....	4, 7
SDCL Section 1-1-25	3

OTHER AUTHORITIES:

North Dakota Constitution Art. XIII, Section 1, clause 2	8
North Dakota Supreme Court Rule 7.2	3

INTEREST OF AMICUS CURIAE

This brief is filed pursuant to Rule 37 of the United States Supreme Court Rules. The consent of both the petitioners and respondents to the submission of this brief is attached hereto. The Northern Plains Tribal Judges Association is an organization of the tribal judges in North Dakota, South Dakota, Minnesota and Nebraska representing twenty-five tribal court systems. The Association is incorporated under the laws of the Sisseton-Wahpeton tribal code. The tribal judges of the Association are acutely concerned about the disposition of this case because it will have a dramatic impact upon their ability to dispense justice for both Indians and non-Indians in Indian country should this Court adopt the holding of the Court below. The Association believes the issues raised in this amicus brief are not duplicative of those raised by the parties and that this Court should be aware of the dramatic impact the curtailment of tribal court civil jurisdiction over non-Indians and non-member Indians would have upon both federal and tribal interests achieved by a tribal court's exercise of jurisdiction over causes of action that arise on trust and restricted land within Indian country.

ARGUMENT

I. THE COURT'S DECISION BELOW THAT EVERY EXERCISE OF TRIBAL COURT SUBJECT MATTER JURISDICTION OVER A CAUSE OF ACTION INVOLVING A NON-INDIAN OR A NON-MEMBER INDIAN SHOULD BE SUBJECT TO THE CRITERIA SET OUT IN *MONTANA V. UNITED STATES*, NOTWITHSTANDING THE CAUSE OF ACTION ARISING ON INDIAN LAND, IS UNPRECEDENTED AND WILL IMPAIR IMPORTANT FEDERAL AND TRIBAL INTERESTS.

The United States Court of Appeals' *en banc* decision in this case, limiting tribal court civil jurisdiction over non-Indians and non-member Indians to cases where a "valid tribal interest" is at stake, *see A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996) (*en banc*), unduly restricts the civil jurisdiction of tribal courts and will impede the progress of tribal courts in delivering justice to all litigants in Indian country. By applying this Court's *Montana* criteria, *see Montana v. United States*, 450 U.S. 544 (1981), to every exercise of subject matter jurisdiction by a tribal court over a non-Indian or a non-member Indian, the Court below has emasculated the ability of tribal courts to provide remedies for both Indians and non-Indians in routine domestic relations cases, tort actions, consumer matters and other disputes that are brought before tribal courts on a daily basis. This unwarranted and unprecedented proscription of tribal court jurisdiction cannot be rejoined by a concomitant expansion of state court jurisdiction over these reservation affairs because of explicit limitations in state constitutions restricting state court jurisdiction over affairs involving Indians that arise within Indian country. The result is that

no forum will be available to many litigants, Indians and non-Indians alike, with legitimate grievances arising in Indian country. This Court should reverse the decision below and restore some sanity to this area of law by reaffirming its decisions in *Montana, supra*, and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) recognizing that there has not been an explicit or implicit divestiture of tribal authority over any person on trust or allotted land within Indian country.

Indian tribal courts today routinely determine important personal and property rights of a variety of litigants including tribal members, members of other Indian tribes, Indians who are not enrolled with any tribe but are eligible for membership, Canadian Indians, and non-Indians. When exercising this jurisdiction tribal courts must comply with both their own organic documents pertaining to the exercise of jurisdiction (constitutions and codes), as well as federal statutes and court decisions discussing the extent of a tribal court's civil jurisdiction. *See National Farmer's Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) (extent to which tribal court can exercise civil jurisdiction over non-Indians is a question of federal law). Tribal courts must also remain cognizant of state statutory and case law discussing the extent of tribal court jurisdiction because in many circumstances tribal decisions will need to be enforced through recognition by a state court. *See* SDCL 1-1-25 (requiring state courts in South Dakota to grant comity to tribal court orders in certain circumstances) and North Dakota Supreme Court Rule 7.2 (requiring North Dakota courts to award full faith and credit to tribal court orders provided certain circumstances are met).

Recent developments on both the federal and state levels have brought much visibility to tribal court adjudications and have elevated tribal courts on a par with state and federal courts. For example, the recently enacted Violence Against Women Act requires state and tribal courts to honor each others protection orders in domestic violence cases. See 18 U.S.C. Section 2265. A 1994 amendment to the federal full faith and credit act requires tribal and state recognition and enforcement of each others child support orders. See 28 U.S.C. Section 1738B. Congress now recognizes the viability of a federal crime for a person who crosses reservation boundaries for purposes of violating a tribal court protection order. See 18 U.S.C. Section 2262. Congress has given tribal courts exclusive jurisdiction over the foreclosure of allotted and trust land within reservation boundaries, irrespective of the race or residence of any mortgagee. See 25 U.S.C. Section 483a; *Northwest Production Credit Association v. Smith*, 784 F.2d 323 (8th Cir. 1985). The Indian Child Welfare Act grants tribal courts exclusive subject matter jurisdiction over Indian children domiciled in Indian country, without regard to the race of the parents and guardians of those children. See 25 U.S.C. Section 1911(a). Even the United States can be compelled to litigate an issue of primarily tribal law first in the tribal courts. See *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996).

These congressional enactments and court decisions, although not explicit grants of jurisdictional authority to Indian tribal courts in some circumstances, are an acknowledgment that tribal courts play an important role

in the resolution of disputes for both Indians and non-Indians that arise in Indian country. The decision below creates a substantial obstacle to a tribal court's effective exercise of civil jurisdiction as it appears to require a Plaintiff in tribal court, in any case in which a non-member of the Indian tribe is an adverse party, to demonstrate that the case either implicates that party's consensual relations with the Tribe or its members or that that party's conduct "threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the Tribe." *Montana*, at 565-566. An impact on a tribal member, as opposed to the Tribe itself, is apparently not enough to satisfy the *Montana* criteria. See *Red Fox v. Hettich*, 494 N.W.2d 638, 645-647 (S.D. 1993) (holding that a tribal court cannot exercise jurisdiction over action brought by tribal member against non-Indian for injuries suffered as result of auto accident because *Montana* rule requires impact on Tribe, not tribal member).

It is important to note that this Court in *Montana*, at 557, explicitly acknowledged the regulatory authority of tribes over activities that non-Indians and non-members engage in on trust or allotted lands within reservation boundaries. Arguendo, therefore, if *Montana* applies to a tribal court's exercise of adjudicatory jurisdiction, as the Court below held, this rule should be similar unless *Montana* cuts a more restrictive swath with regard to adjudicatory jurisdiction, which it clearly does not. If *Montana* is the controlling precedent for the extent of a tribal court's civil jurisdictional authority over

non-Indians or non-members in the tribal forum, its jurisdiction should not be proscribed if the underlying litigation involves activities committed on trust or allotted land within the reservation.

However, the subject matter jurisdiction rule adopted by the *en banc* court below ignores this distinction and creates a monolithic rule governing every attempt by a tribal court to exercise subject matter jurisdiction over any case involving a non-Indian or non-member Indian. Such a rule will likely defeat the exercise of civil jurisdiction in many cases where tribal courts routinely exercise jurisdiction today and will leave many litigants, Indian and non-Indian alike, without a forum to litigate a dispute.

For example, under the rule adopted by the court below a tribal court could not enjoin a non-member from illegally hunting on trust or allotted land, unless the second criteria of *Montana* is met, an unlikely scenario. See *South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994) (on remand from this Court, court affirms decision of district court that hunting and fishing by non-Indians on lands in fee status because of previous taking to construct dam on Missouri River did not impact tribe substantially enough to justify regulation under *Montana*). Not only is such a conclusion absurd in light of this Court's recognition in *Montana* that a Tribe can regulate such activity, but it seems to be inconsistent with both 18 U.S.C. Section 1165, declaring it a trespass for a non-Indian to hunt or fish on Indian land without tribal permission, and the federal court decisions directing that tribal courts adjudicate disputes involving trespass to Indian land. See *United States v. Plainbull*, *supra*; *United States v. Tsosie*, *supra*.

Similar inequities would result in other areas of tribal court adjudications. A tribal court could not evict a non-Indian or non-member from an Indian housing project on trust land as part of a domestic abuse order unless the *Montana* criteria was shown. A tribal court could not punish a non-Indian with civil contempt for violating the terms of a tribal court protection order unless the abused party could demonstrate that the exercise of tribal court jurisdiction is necessary to protect tribal self-government. A tribal court could not order the garnishment of the wages of a non-member child support obligor employed by a tribal casino located on trust land, even pursuant to a valid state court child support order required to be recognized under 28 U.S.C. 1738B. A tribal court could not exercise jurisdiction over a tort action brought by a non-Indian against a non-member Indian in tribal court even if it arises on trust land on the reservation. A tribal court could not terminate the parental rights of a non-Indian or non-member parent even if the child involved is a tribal member residing within Indian country, in apparent contradiction to the federal Indian Child Welfare Act, see 25 U.S.C. Section 1911(a). Lastly, a tribal court could not proceed with a paternity establishment against a non-Indian or non-member even though the child resides on trust land on the reservation and the child was conceived there, again in apparent contradiction to federal policy. See *Howe v. Ellenbecker*, 774 F.Supp. 1224 (D.S.D. 1992), *aff'd*, 8 F.3d 1258 (8th Cir. 1993) (federal policy underlying Title IV-D of the Social Security Act contemplates that child support actions involving reservation-domiciled Indian children be brought in the tribal courts).

What makes the lower court's unwarranted extension of *Montana* even more alarming to the tribal judges is that the state courts will not be available in many of these instances to fill the jurisdictional void left by the decision below because of constraints in their own state constitutions. The North Dakota Constitution, for example, has a provision which disclaims jurisdiction over all Indians in Indian country, see N.D. Const. Art. XIII, Section 1, clause 2, unless jurisdiction is lawfully acquired pursuant to federal law. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986). The Supreme Court there has declared that under this constitutional provision it has no jurisdiction over a tort action brought by a non-Indian against a non-member Indian because the relevant inquiry under North Dakota law is the Defendant's status as an Indian, not his status as a tribal member. See *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975). In a similar vein the North Dakota Supreme Court has declared that the state courts have no subject matter jurisdiction over paternity and child support actions where the Indian child was conceived on the reservation, apparently without regard to the race of the putative father. See *In Interest of M.L.M.*, 529 N.W.2d 184 (N.D. 1995); *McKenzie County Social Services Board v. V.G.*, 392 N.W.2d 399 (N.D. 1986), *cert. denied*, 480 U.S. 930 (1987). Under the decision below it is doubtful that the tribal court would have subject matter jurisdiction over a non-Indian or non-member father whose only contact with the reservation was to have sexual relations and father a child there. Such an inequitable result will impact every litigant in Indian country, not just the Indian tribe and its members, because every tribal court represented

by the Northern Plains Tribal Judges' Association sees a parade of non-Indians and non-member Indians come before its court system on a regular basis, sometimes seeking relief and other times defending cases.

The decision below, because it fails to apply this Court's clear admonition in *Montana* that a tribe's regulatory authority is proscribed only in cases when a tribe is attempting to regulate the use of a non-Indian's fee land, creates a rule which would invite jurisdictional chaos into Indian country and defeat important tribal and federal interests. This Court should reaffirm the continued viability of the clear rule in *Montana* that tribes, and consequently their courts, have authority over activities that non-Indians and non-member Indians engage in on Indian trust and allotted lands.

II. THE LOWER COURT'S OPINION, INsofar AS IT EQUATES NON-INDIANS WITH NON-MEMBER INDIANS, IS UNNECESSARY DICTA WHICH THIS COURT SHOULD DISABUSE.

Throughout the lower court's opinion the terms non-Indian and non-member are used almost interchangeably. For example, the Court below announces the tribal court subject matter jurisdiction rule of an Indian tribal court as follows: "a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember . . ." At 939. This rule is announced despite the fact that this case does not involve the question of a tribal court's jurisdiction over non-member Indians from other Tribes. It does not appear from the briefs to the lower court that either of the parties

addressed the extent to which tribal courts may exercise civil jurisdiction over non-member Indians.

This is an issue of critical importance to the *amicus* because of the substantial number of non-member Indians who live and work on other reservations and have intermarried into other Tribes. For example, the Sioux reservations of South Dakota came into existence after the Great Sioux Nation was divided by allotment in 1889. See *United States v. Sioux Nation*, 448 U.S. 371 (1980). This was somewhat of an artificial division, however, because the separate bands that constituted the "Great Sioux Nation" were interrelated and continue to be so to this day. There are a substantial number of Sioux Indians who are enrolled with one tribe but live and work on the reservation of another Tribe. Similarly, among the bands of Indians that constitute the Minnesota Chippewa Tribe, each band may have their own court system and band laws, but they each belong to the Minnesota Chippewa Tribe. If the lower court decision has curtailed civil jurisdiction over non-Band members it has achieved a massive interference with the ability of the separate Bands of the Minnesota Chippewa Tribe to dispense justice on their own reservations even for persons who are constituent members of a larger Tribe.

The litigation in this case deals solely with the question of whether a tribal court can exercise subject matter jurisdiction over a civil action involving non-Indians arising on trust land within the reservation boundaries. The lower court apparently raised the issue of the extent of tribal court jurisdiction over non-member Indians on its own initiative even though resolution of that issue was not necessary to the disposition of the pending case. In a

similar circumstance, involving the authority of a tribe to regulate hunting and fishing by non-Indians, the United States Court of Appeals for the Eighth Circuit admonished a district court for ruling on the extent of a Tribe's regulatory authority over non-member Indian hunting and fishing when that issue was not before the Court. See *South Dakota v. Bourland*, 508 U.S. 679, 686 n.6 (1993). That Court has failed to heed its own admonishment in this case and has consequently created much consternation for tribal courts in the Eighth Circuit because of difficulty in interpreting the meaning of the decision below.

This Court, irrespective of whether it affirms or reverses the decision below, should disavow the language below which implies that the extent of a tribal court's civil jurisdiction over a non-Indian is the same in all extents as its jurisdiction over non-member Indians. Such language is unnecessary dicta and should be repudiated. See e.g., *Hodel v. Irving*, 481 U.S. 704, 710 n.1 (1987) (lower court erred in ruling on constitutionality of amended escheat provisions of Indian Land Consolidation Act when no land in pending case escheated under amended provisions).

CONCLUSION

For the reasons stated herein, *amicus* urges this Court to reverse the decision of the Court below and to rule that the tribal court had jurisdiction over the subject matter between the parties. The *amicus* also urges this Court to disaffirm the language in the lower court's opinion equating the subject matter jurisdiction of a tribal

court over a dispute involving a non-Indian Defendant
with that of a dispute involving a non-member Indian.

Respectfully submitted this 8th day of November,
1996.

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No. 95-1872

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In the
Supreme Court of the United States
October Term, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE
TRIBAL JUDGE OF THE TRIBAL COURT OF THE
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GISELA FREDERICKS,

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**BRIEF OF AMICI CURIAE THE YAVAPAI-APACHE
NATION, SHOSHONE TRIBE OF
THE WIND RIVER INDIAN RESERVATION, AND
LUMMI NATION IN SUPPORT OF PETITIONERS**

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38 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
POINT I	7
MORE THAN A CENTURY AND A HALF OF SUPREME COURT PRECEDENT RECOGNIZES THAT, ABSENT CONGRESSIONAL DIVESTITURE OR VERY NARROW INSTANCES OF JUDICIAL LIMITATION, TRIBES RETAIN BROAD INHERENT SOVEREIGN POWERS OVER ALL PERSONS AND ACTIVITIES WITHIN THEIR RESERVATION TERRITORIES	8
A. Tribal Adjudicatory Jurisdiction	12
B. Tribal Regulatory Jurisdiction	14
POINT II	17
THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THIS COURT'S HISTORIC TREATMENT OF TRIBAL JURISDICTION AND MUST BE REVERSED	17
A. On Its Facts, This Case Was Wrongly Decided.	17
B. The <u>Montana</u> Decision And The Need For Clarification.	21

C.	<u>Montana</u>	23
1.	<u>Montana</u> Does Not Support The Broad Rule Attributed To It.	23
2.	<u>Montana</u> Fundamentally Was Concerned With Protecting Non- Members' Federal Constitutional Rights.	25
CONCLUSION		30

TABLE OF AUTHORITIES

CASES:

<u>A-1 Contractors v. Strate</u> , 76 F.3d 930, 935 (8th Cir. 1996)	19, 23, 24
<u>Application of Konaha</u> , 131 F.2d 737 (7th Cir. 1942)	18n
<u>Buster v. Wright</u> , 135 F. 947 (8th Cir. 1905)	14, 15, 16
<u>Cherokee Nation v. Georgia</u> , 30 U.S. (5 Pet.) 1 (1831)	1
<u>Confederated Salish & Kootenai Tribes, et al. v. Namen</u> , 665 F.2d 951 (9th Cir.), <u>cert. denied sub nom.</u> <u>Polson v. Confederated Salish & Kootenai Tribes</u> , 459 U.S. 977 (1982)	25n
<u>FMC v. Shoshone-Bannock Tribes</u> , 905 F.2d 1311 (9th Cir. 1990), <u>cert. denied</u> , 499 U.S. 943 (1991)	25n
<u>Hinshaw v. Mahler</u> , 28 F.3d 106 (9th Cir.), reported at 42 F.3d 1178 (9th Cir.), <u>cert.</u> <u>denied</u> , 115 S. Ct. 485 (1994)	20, 21, 25n
<u>In re Fredenberg</u> , 65 F. Supp. 4 (D. Wis. 1946)	18
<u>Iowa Mutual Ins. Co. v. LaPlante</u> , 480 U.S. 9 (1987)	<i>Passim</i>
<u>Johnson v. M'Intosh</u> , 21 U.S. (8 Wheat.) 543 (1823)	10
<u>Merrion v. Jicarilla Apache Tribe</u> , 455 U.S. 130 (1982) ...	<i>Passim</i>
<u>Montana v. United States</u> , 450 U.S. 544 (1981)	<i>Passim</i>
<u>National Farmers Union Ins. Cos. v. Crow Tribe of Indians</u> , 471 U.S. 845 (1985)	<i>Passim</i>

<u>New Mexico v. Mescalero Apache Tribe</u> , 462 U.S. 324 (1983)	8, 16
<u>Oliphant v. Suquamish Indian Tribe</u> , 435 U.S. 191 (1978)	<i>Passim</i>
<u>Oneida Indian Nation v. County of Oneida</u> , 414 U.S. 661 (1974)	10
<u>Santa Clara Pueblo v. Martinez</u> , 436 U.S. 49 (1978)	9, 9n, 14, 28
<u>South Dakota v. Bourland</u> , 508 U.S. 679 (1993)	8
<u>State v. Begay</u> , 63 N.M. 409, 320 P.2d 1017, <i>cert.</i> <i>denied</i> , 357 U.S. 918 (1958)	18n
<u>Three Affiliated Tribes of Ft. Berthold Reservation</u> <i>v. Wold Engineering, P.C.</i> , 476 U.S. 877 (1986)	9
<u>United States v. Mazurie</u> , 419 U.S. 544 (1975)	8
<u>United States v. Wheeler</u> , 435 U.S. 313 (1978)	8
<u>Washington v. Confederated Tribes of Colville Indian</u> <i>Reservation</i> , 447 U.S. 134 (1980)	<i>Passim</i>
<u>White Mountain Apache Tribe v. Bracker</u> , 448 U.S. 136 (1980)	8, 9
<u>Williams v. Lee</u> , 358 U.S. 217 (1959)	8, 9, 12
<u>Worcester v. Georgia</u> , 31 U.S. (6 Pet.) 515 (1832)	<i>Passim</i>
<u>Yellowstone County v. Pease</u> , No. 95-36026, 1996 WL 512363 (9th Cir. Sept. 11, 1996)	25n

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Crow Allotment Act of 1920, 41 Stat. 751, repealed 44 Stat. 886 (1926), 22 U.S.C. § 27 (1990)	22, 26
Federal Insecticide and Rodenticide Act, Environmental Protection Agency Regulations, 40 C.F.R. 171.10	10n
General Allotment Act of 1887, 24 Stat. 388 (1887), codified as amended 25 U.S.C. §§ 331 et seq. (1983)	22, 26
Indian Civil Rights Act, Pub. L. 90-284, 82 Stat. 77 (1968), as amended 25 U.S.C. §§ 1301 et seq. (1996 Supp.)	<i>Passim</i>
Major Crimes Act of 1885, 23 Stat. 385 (1885), codified as amended 18 U.S.C. § 1153 (1996 Supp.)	26
Safe Drinking Water Act, Pub. L. 93-523, 88 Stat. 1676 (1974), as amended 42 U.S.C. § 300h-1(c)(1991); Pub. L. 99-339, 100 Stat. 665 (1986), as amended 42 U.S.C. §§ 300j-11(a)(1) (1991)	10n
25 U.S.C. § 323 (1983)	18
25 U.S.C. § 324 (1983)	18

TRIBAL CODES:

Law and Order Code of the Shoshone Tribe of the Wind River Indian Reservation ("Shoshone Code"), Title I, Ch. 1; Ch. 2, §§ 1-2-1 to 1-2-5; Ch. 16, § 1-6-1	2n, 5
--	-------

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Yavapai-Apache Nation Civil Actions, Ch. 2, § 2.1	4
Yavapai-Apache Nation Constitution, Article III, Section 1	4
Yavapai-Apache Nation Tort Remedies Procedures, § 5	3
Zuni Tribal Code, Ch. 6, § 1-6-1	2n

OTHER AUTHORITIES:

7 Op. Att'y Gen. 175 (1855)	13
Powers of Indian Tribes, 55 Interior Dec. 14 (1934)	14

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NATION, SHOSHONE TRIBE OF
THE WIND RIVER INDIAN RESERVATION, AND
LUMMI NATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*¹

This case poses one of the greatest threats to tribal sovereignty in recent history. American jurisprudence characterizes Indian tribes as "domestic dependent nations."² It is a difficult task, unique among our legal constructs, to balance the "dependent" and the sovereign nation aspects of that characterization. Wrestling with these issues, a sharply divided *en banc* Eighth Circuit Court of Appeals has enunciated a rule that emasculates tribal sovereignty. It need not have done so, since the facts before it clearly supported tribal court jurisdiction under prevailing law. If this Court sustains the ruling below, every Indian tribe in this country will lose an integral aspect of what makes it a sovereign government: the ability to regulate the conduct of all persons acting within its territory and the ability of all such persons to enjoy the benefits of a civilized society provided by these tribal governments.

Amici Curiae Yavapai-Apache Nation, Shoshone Tribe of the Wind River Reservation, and the Lummi Nation ("*amici*") are federally-recognized Indian tribes and submit this brief in support of Petitioners. *Amici* have been vested with tribal powers by treaty, statute, and inherent sovereignty to occupy and govern designated reservation territories. They exercise governance over their respective territories by providing essential governmental services, such as police and fire service protection, emergency medical services, and competent tribal court forums, to all persons conducting personal and business affairs within the exterior boundaries of their reservations.

The tribal *amici* have established tribal courts with jurisdiction to adjudicate civil disputes arising within their territory. *Amici* exercise tribal court jurisdiction over non-members involved in disputes arising within their reservations to varying degrees, but each ensures the protection of the rights of members and non-members in

¹Pursuant to Supreme Court Rule 37(3)(a), the written consent of counsel for both the Petitioners and the Respondents is submitted for filing herewith.

²Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

accordance with the Indian Civil Rights Act ("ICRA").³ The availability of a tribal court forum to resolve disputes arising within the Tribes' territorial jurisdiction is of crucial importance to members and non-members alike. Significantly, Petitioners do not seek exclusive jurisdiction,⁴ and *amici* do not urge a rule that would require such a result. Neither Petitioners nor *amici* seek authority to exercise civil jurisdiction over non-members in an arbitrary, abusive, or discriminatory manner.⁵ However, the ability to exercise jurisdiction over disputes arising within their territory, regardless of the membership status of the litigants or parties involved directly in the dispute, is an essential attribute of tribal sovereignty and self-government. No other government in our federal system is deprived of the ability to establish and enforce rules governing the territory over which it has responsibility based on the race of persons. Tribal governments should be treated no differently. Such a fundamental, essential power cannot be diminished unless Congress affirmatively divests tribes of the power to exercise such jurisdiction over particular matters.

³25 U.S.C. §§ 1301 *et seq.* (1996 Supp.).

⁴The Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Three Tribes") Tribal Court seeks only concurrent, not exclusive, jurisdiction over the tort action. Petition for a Writ of Certiorari at 6 n.7.

⁵Indian tribes exercise their jurisdiction responsibly and in accordance with the law. *Amici* refer this Court to the 1985 survey of tribal courts compiled by the Bureau of Indian Affairs, the federal agency designated to oversee tribal relations with the federal government, regarding tribal court systems. This 1985 survey documents tribal compliance with the Indian Civil Rights Act, particularly the equal protection and due process requirements of the Act, and the varying degrees to which tribes exercise jurisdiction over non-members. Some tribes choose to limit their courts' jurisdictional reach to tribal members. Others exercise jurisdiction over both members and non-members. See Law and Order Code of the Three Affiliated Tribes of the Fort Berthold Reservation, Ch. 1, § 3.2; Law and Order Code of the Shoshone Tribe of the Wind River Indian Reservation ("Shoshone Code"), Ch. 2, §§ 1-2-1 through 1-2-5. Some provide for the inclusion of non-members in their jury pools. See Shoshone Code, Ch. 16, § 1-6-1; Zuni Tribal Code, Ch. 6, § 1-6-1.

Each of the *amici* has large numbers of non-members residing and/or visiting within the exterior boundaries of its reservation. Members and non-members mingle inextricably at work, at home, in commerce, and in transit. They live under the same roofs and on adjoining lots. Not least because it is governmentally inefficient and politically counterproductive to treat members and non-members differently, each of the *amici* has chosen to exercise its jurisdiction over such non-members and to provide governmental services to them. The specific interest of each *amicus* tribe follows:

The Yavapai-Apache Nation. The Yavapai-Apache Nation occupies and governs four reservation parcels located in northern Arizona. Approximately 15% of the population residing within the exterior boundaries of the Reservation are non-members. The Yavapai-Apache Nation operates various commercial enterprises on its Reservation, including the Cliff Castle Casino and Montezuma Visitors' Center, which employ non-member residents and attract many non-member patrons. The Yavapai-Apache Nation provides territorial governance that benefits all persons who enter the Reservation, regardless of membership or residency status. Specifically, the Yavapai-Apache Nation maintains roads, provides a sewage system, and protects its water, environment, and other natural resources.⁶ Similarly, the Yavapai-Apache Nation affords police protection, fire department services, and emergency medical treatment for the health and safety of all persons who enter the Reservation, regardless of membership or residency. The Nation's tort remedies procedure contains a limited waiver of sovereign immunity, thereby permitting both members and non-members to sue for damages arising from torts committed at the Cliff Castle Casino. Yavapai-Apache Nation Tort Remedies Procedures, § 5.

The Yavapai-Apache Nation has established a competent, impartial court system, which is available to members and non-members involved in disputes arising within the Reservation

⁶For instance, the Nation recently achieved a Class I air quality designation from the Environmental Protection Agency for the Reservation, which designation benefits all persons residing and entering the Reservation.

boundaries. The Nation's Constitution preserves the integrity of the tribal court system by establishing a judicial branch of government composed of the Tribal Court and a Court of Appeals, with powers that are separate and independent from the legislative and executive branches of the tribal government. Yavapai-Apache Constitution, Article III, Section 1. The Yavapai-Apache Nation does not exercise civil adjudicatory jurisdiction over non-members unless the non-member consents in writing. Yavapai-Apache Nation Civil Actions, Ch. 2, § 2.1. However, while the Nation has thus far chosen not to exercise civil jurisdiction over non-members without their written consent, the Tribal Court's authority to exercise concurrent jurisdiction over non-member litigants who voluntarily enter tribal territory for personal or business purposes is essential to the Nation and within its jurisdictional powers.

The Shoshone Tribe of the Wind River Reservation ("Shoshone"). The Shoshone occupy a reservation located in the State of Wyoming. Approximately 5,676 members reside within the exterior boundaries of the Reservation.⁷ Over 74% of the Reservation residents are non-members (16,175 of 21,851). However, the vast majority of those are non-member Indians, are married to members, work for the Tribe either as employees or contractors, or have economic and other relations with the Tribe, such as lessees, vendors, customers, or recipients of tribally funded services. In addition, a significant number of non-member non-residents frequent the Reservation and interact with the Tribe at various levels because of its location and economic development (mineral, agricultural, and tourism).

Regardless of membership or residency, all persons on the Reservation receive the benefits and privileges afforded by Shoshone governance of its territory. Specifically, the Shoshone provide roads, courts, wildlife, management, environmental protection, water rights administration, and pre-school education services. Shoshone laws protect members and non-members alike in areas of domestic relations, commercial transactions, safety, health, civil rights, housing,

⁷The Reservation is shared and jointly governed with the Northern Arapaho Tribe. Figures given here include members of both Tribes subject to the jurisdiction of the joint Tribal Court.

trespass, and liquor. Many of such laws are more protective of individual and business rights than comparable state law.

The Shoshone have established a tribal court system, governed by a comprehensive Law and Order Code. The Law and Order Code delineates the court's authority, which provides a forum for members and non-members to resolve disputes arising on the Reservation in accordance with equal protection and due process requirements of the ICRA. Law and Order Code of the Wind River Reservation, Title 1, Ch. 1. In fact, non-Indians have demonstrated extraordinary confidence in the Tribal Court: in 1995, non-Indians commenced 116 civil actions in the Tribal Court (while non-Indians were made defendants in only 19 cases). Non-Indian parties before the Tribal Court have included some of the largest oil companies in this country, the State of Wyoming, and nationwide lenders. Thus, Shoshone asserts an interest in this case on behalf of its members and the non-members who depend on the Shoshone Tribal Court to administer justice throughout the Reservation.

The Lummi Nation. The Lummi Reservation is located on the coast of the State of Washington. Approximately 49% of the population residing within the exterior boundaries of the Lummi Reservation are non-members. The Lummi government provides various services that benefit all persons who enter the Reservation for domestic or commercial purposes, regardless of membership or residency. Because the Lummi Reservation is situated on coastal waters, the tribal government expends a large portion of its governmental resources to preserve the Reservation's natural resources. The Nation commits substantial governmental resources to administer and protect the Reservation's surface and ground water resources, which are particularly vulnerable to degradation and depletion due to the contamination of surface waters by up-stream, off-reservation activities; by salt water intrusion due to the intruding coastal waters; and by over-development of fee lands owned by non-members. The laws of the Lummi Nation require the involvement and participation of non-members in the tribal government's management of its water resources, because non-member use, both on- and off-reservation, has tremendous impacts upon the on-reservation water resources. For example, the Lummi Nation's Water and Sewer Code provides that two of the five members of the

Lummi Water and Sewer Board be elected by a vote of all Reservation residents, regardless of tribal membership. Currently, two non-Indians serve on this Board.

The Lummi Nation provides a competent court system, available to members and non-members alike. The Nation ensures the integrity of its court system through its Law and Order Code and Civil Rules of Procedure. Thus, the authority of the Lummi Tribal Court to exercise concurrent jurisdiction over non-member litigants who voluntarily enter tribal territory for personal or business purposes is essential to the Lummi Nation and within its jurisdictional powers.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision flies in the face of one hundred and fifty years of decisions by this Court preserving tribal sovereignty. (Pt. I). Over the years, this Court's determinations of tribal jurisdiction have steadfastly recognized one fundamental rule: civil jurisdiction over the activities of non-members within the exterior boundaries of reservation lands lies with the tribe designated to occupy and govern that territory, unless expressly divested by Congress in a specific treaty or federal statute. In perpetuating this fundamental rule, the Court continues to reaffirm the territorial nature and scope of tribal powers that have existed, uninterrupted, since time immemorial, whether vested by treaty, statute, or inherent sovereignty. These territorial powers give tribes the authority to exercise legislative and judicial civil jurisdiction over non-members within the boundaries of the reservation, unless Congress affirmatively withdraws a specific tribal power that divests tribes of jurisdiction over a particular matter.

In this case, the Three Affiliated Tribes of the Fort Berthold Reservation ("Three Tribes") have the requisite territorial interest in and power to exercise civil jurisdiction over tort actions involving non-members on the state highway in question. That highway was established on tribal trust lands under a federal right-of-way statute that did not divest tribes of the power to adjudicate disputes involving tort actions arising on the state highway. The mere fact that the underlying incident involved non-members is not controlling.

Thus, the Three Tribes have authority to exercise concurrent civil jurisdiction over Mrs. Fredericks' tort action.

The Eighth Circuit's decision stands opposed to the full weight of this Court's historical view of tribal jurisdiction. Given the particular facts of the case below, it is wrongly decided under its primary authority, Montana v. United States, even assuming (which *amici* do not) that the Eighth Circuit's reading of Montana is correct. (Pt. IIA). First, the facts in this case amply meet both of Montana's so-called "exceptions" and the Eighth Circuit's new hybrid test, since they more than sufficiently implicate a "valid tribal interest." Thus, on the facts alone, this case meets all of the articulated standards for tribal jurisdiction and should have been decided differently.

Finally, even were this case rightly decided under the Eighth Circuit's view of Montana, that view is incorrect. (Pt. IIB). Montana has been interpreted in a far more expansive manner than necessary. Montana does not stand as controlling precedent for all determinations of tribal civil jurisdiction over non-members. Unfortunately, the unnecessarily broad language used to achieve the Court's relatively narrow holding has led many courts to misinterpret and misapply Montana in this manner, creating confusion and uncertainty in the law and a virtual paralysis of tribal governments' ability meaningfully to protect reservation citizens and resources.

Montana did not arise in a vacuum, and it cannot be applied slavishly every time a non-tribal member is brought before a duly constituted tribal court. This Court should clarify its earlier holding by replacing the ever-expanding myth of Montana with a more narrowly stated rule properly reflecting the facts of that case and precedent. If such a reconciliation is impossible, *amici* submit that Montana must be re-examined and replaced with a rule that frankly acknowledges tribal jurisdiction over all persons in the tribal territory as the presumptive norm.

ARGUMENT

POINT I

MORE THAN A CENTURY AND A HALF OF SUPREME COURT PRECEDENT RECOGNIZES THAT, ABSENT

**CONGRESSIONAL DIVESTITURE OR VERY NARROW
INSTANCES OF JUDICIAL LIMITATION, TRIBES RETAIN
BROAD INHERENT SOVEREIGN POWERS OVER ALL
PERSONS AND ACTIVITIES WITHIN THEIR RESERVATION
TERRITORIES**

This Court historically has recognized the territorial scope of tribal jurisdiction and has established a fundamental rule of tribal sovereignty: tribes have the power to exercise jurisdiction over all persons within their reservation boundaries, including non-members, unless Congress affirmatively withdraws specific tribal powers in a treaty or a federal statute. For more than one hundred and fifty years, it has been recognized that tribes retain the powers of government that they possessed at the time of their incorporation into the United States. Tribes did not lose their inherent powers upon becoming "domestic dependent nations." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). Specifically, tribes have the inherent sovereign power to govern "both their members *and their territory*." United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added), quoting United States v. Mazurie, 419 U.S. 544, 557 (1975), citing Worcester v. Georgia, 31 U.S. at 557; see also Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). Inherent territorial powers also give tribes the authority to exercise jurisdiction over non-members within reservation boundaries. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Williams v. Lee, 358 U.S. 217 (1959); see also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

Time and again, this Court has reaffirmed these fundamental Indian law principles. The Court has recognized that only Congress, in appropriate circumstances, can abrogate inherent tribal sovereign power, and it may do so only by express and unambiguous statement. Williams v. Lee, 358 U.S. at 223; Wheeler, 435 U.S. at 322-23; South Dakota v. Bourland, 508 U.S. at 679, 687 (1993) (citations omitted). It is the role of Congress, not the courts, to alter tribal sovereign authority. Tribal powers exist at the sufferance of Congress. Wheeler, 435 U.S. at 323. This Court will not find that Congress

divested tribes of inherent sovereign powers unless the congressional act contains an explicit divestiture. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978). Indeed, this Court has "consistently guarded the authority of Indian governments over their reservation. If this power is to be taken away from them, it is for Congress to do." Williams v. Lee, 358 U.S. at 223.

In determining whether Congress intended to abrogate tribal powers, this Court requires deference to Congress's "longstanding policy of encouraging tribal self-government." Iowa Mutual, 480 U.S. at 14, citing Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); Merrion, 455 U.S. at 138; White Mountain Apache Tribe v. Bracker, 448 U.S. at 143-44 and n.10; Williams v. Lee, 358 U.S. at 220-21. A "proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [this Court] tread lightly in the absence of clear indications of legislative intent." Santa Clara Pueblo, 436 U.S. at 60. Congress has the ability to act expeditiously to address any concerns it may have regarding the exercise of tribes' sovereign powers, and Congress should be left free to make these important federal policy determinations.

As this Court has recognized, Congress has occasionally stepped in to protect individual liberties and overriding national interests on Indian reservations. Directly relevant here, and discussed *infra* at 28-30, Congress intervened in tribal governance when it enacted the Indian Civil Rights Act, which imposed upon tribes most of the protections contained in the Bill of Rights. 25 U.S.C. §§ 1301 *et seq.* (1996 Supp.).⁸ Congress also has extended various environmental laws and regulations to reservations, thereby protecting national

⁸Acknowledging the protections afforded by the Act to individuals subject to tribal court or regulatory jurisdiction, this Court has recognized that Congress views the administration of justice through tribal forums as an essential attribute of tribal sovereignty. Thus, Congress did not intend to waive tribal sovereign immunity from suit in the Act so that claims under the Act could be heard in federal courts, but, rather, intended to have tribal forums adjudicate such claims. Santa Clara Pueblo, 436 U.S. at 58-59.

interests while reaffirming tribal sovereign authority.⁹ However, based upon the federal government's policy promoting tribal self-government and the tribal governments' initiatives to develop administrative and personnel resources capable of undertaking the responsibilities of comprehensive territorial management, even Congress has favored a "hands off" approach with regard to tribal sovereignty.¹⁰

Notwithstanding Congress's sole authority to divest tribes of their sovereign powers, this Court has, in three unique circumstances, determined that, by virtue of tribes' dependent status, the exercise of specific tribal sovereign powers is not "inherent" to tribes because the exercise of these particular powers is "necessarily inconsistent" with preserving the sovereignty of the United States. Colville, 447 U.S. at 153-54; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). First, by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to alienate the land they occupy to non-Indians without federal consent. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). Second, tribes also gave up their right to enter into direct commercial or governmental relations with foreign nations. Worcester v. Georgia, 31 U.S. at 559. More recently, this Court added a third inherent

⁹See 33 U.S.C. § 1377 (permits Environmental Protection Agency to approve Clean Water Act programs for tribal governments); 42 U.S.C. § 7601(d) (Clean Air Act expressly authorizes Environmental Protection Agency to treat tribes as states for federal air protection programs, and tribal jurisdiction over air resources encompasses all lands within reservation boundaries); 42 U.S.C. §§ 300j-11(a)(1), 300h-1(e) (Safe Drinking Water Act allows tribes to be treated as states, which permits the Environmental Protection Agency to approve tribes' primary enforcement responsibility for public water systems and underground injection programs); 40 C.F.R. 171.10 (under Federal Insecticide and Rodenticide Act, the Environmental Protection Agency may approve tribes' authority to operate pesticide application certification programs).

¹⁰Indeed, Congress has acted affirmatively and decisively to protect tribal sovereignty by making clear that tribes have authority to prosecute and convict non-member Indians. 25 U.S.C. §§ 1302(2), (3), and (4) (1996 Supp.)

limitation on tribal powers: by submitting to the overriding sovereignty of the United States, tribes gave up the right to prosecute criminally non-Indians in tribal courts that do not accord the full protections of the Bill of Rights. Oliphant, 435 U.S. at 210.

This Court deemed the exercise of these three very specific powers as "necessarily inconsistent" with tribes' "dependent status," because unbridled exercise of these powers could undermine and threaten the overriding interests of the United States as the "guardian" sovereign.¹¹ The judicial implicit divestiture of tribal powers in these few instances is a drastic result and should be expanded no further. As noted above, if Congress sees fit, it has the authority to modify tribal authority. In the absence of congressional action, all other inherent sovereign powers of tribes over their reservations remain intact.

Consistent with congressional restraint and narrow circumstances inviting judicial intervention, since at least the time of Chief Justice Marshall, with the possible exception of one case,¹² this Court has recognized tribal authority to exercise civil jurisdiction, regulatory and adjudicatory, over non-members who choose to enter the reservation to conduct personal or business affairs. In the case at bar, the Eighth Circuit majority appears to eliminate congressional desires from the equation. Specifically, it seems to urge a *per se* rule, that tribal jurisdiction over non-members has been implicitly divested by virtue of conquest. This cannot be a proper reading of this Court's precedent or congressional intent. Conquest had been accomplished fully by the time Worcester was decided, yet Chief Justice Marshall recognized and firmly upheld tribal sovereignty and jurisdiction over any person within tribal territory. Worcester v. Georgia, 31 U.S. at 560-62. It is true, as this Court ruled in Montana, that a tribe may not, by regulation, essentially exclude non-members from lands they

¹¹This Court has made clear that tribes are dependent upon, and subordinate to, *only* the federal government; thus, tribal powers may not be limited on the ground that *state* interests are frustrated or undermined by the exercise of tribal power. Colville, 447 U.S. at 154.

¹²Montana v. United States, 450 U.S. 544 (1981), is discussed in detail *infra* at Point II.

own in fee, or otherwise act contrary to overriding national interests. Nonetheless, tribes rarely should be found to lack proper authority to govern their reservations, as their essential power has not been disturbed by Congress and is not *per se* inconsistent with overriding national interests.

A. Tribal Adjudicatory Jurisdiction. This Court has often upheld the exercise of tribal adjudicatory jurisdiction over non-members within reservation boundaries. For instance, in Williams v. Lee, 358 U.S. 217 (1959), the question was whether the Arizona state court or the Navajo tribal court had jurisdiction over a non-Indian's suit to enforce a debt owed from purchases made on the Reservation. Drawing upon the principles of tribal sovereignty established in Worcester v. Georgia, the Court recognized the "right of reservation Indians to make their own laws and be ruled by them," concluding that the Navajo Nation had the authority to adjudicate disputes arising from the on-reservation affairs of non-Indians. 358 U.S. at 218-23. Therefore, where the non-Indian transacted business with an Indian on the reservation, the tribe had the power to exercise civil jurisdiction over the dispute; it was "immaterial" that one of the parties was a non-Indian. *Id.* at 223. Finding no congressional action explicitly divesting tribal authority, this Court held that the Navajo tribal court had jurisdiction over the dispute. *Id.* at 222.

Two recent cases, while offering some guidance on tribal jurisdiction over civil actions arising within the reservation involving non-members, held that the existence of tribal court jurisdiction was to be determined by the tribal court in the first instance. In National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), an action was brought against a public school by the guardian of a Crow tribal member who was struck by a vehicle on school grounds. The school was located on fee land owned by the State within the reservation boundaries. This Court analyzed the Crow Tribe's powers and concluded that the question of whether the Crow Tribe had the power to exercise civil subject matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed by

Oliphant.¹³ Unlike Oliphant, Congress had enacted no legislation granting federal courts jurisdiction over on-reservation civil disputes between Indians and non-Indians. 471 U.S. at 854. This Court drew upon an 1855 opinion of Attorney General Cushing:

Now, it is admitted on all hands . . . that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*

National Farmers, 471 U.S. at 855, quoting 7 Op. Att'y Gen. 175, 179-81 (1855)(emphasis added). This Court went on to observe that, "[i]n the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country." *Id.* at 855 n.17 (citations omitted). In addition, while treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, "Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians." *Id.* (citations omitted).

Similarly, in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987), this Court abstained from determining tribal court jurisdiction but gave direction to the tribal court on the governing law. In a strong recognition of tribal power, the Court observed that civil jurisdiction over non-Indian activities "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Id.*, citing Merrion, 455 U.S. at

¹³Oliphant held that Indian tribes do not have "inherent" powers to prosecute and convict non-Indians except in a manner acceptable to Congress. 435 U.S. 191 (1978). See *infra* at 10-11, 26, 28 n.27.

149 n.14; see also Santa Clara Pueblo, 436 U.S. at 60 ("proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

B. Tribal Regulatory Jurisdiction. Tribes also have a long-recognized right to exercise regulatory jurisdiction over the conduct of non-members on tribal trust lands. In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), this Court upheld a cigarette tax assessed by the Colville, Makah, and Lummi Tribes on non-member purchases. 447 U.S. at 152-54. Analyzing the Tribes' powers, the Court first recognized the longstanding principle of tribal sovereignty that tribes may exercise jurisdiction over non-members conducting business affairs on reservation lands. *Id.* In this regard, the taxing power of tribes is "an essential instrument of self-government and territorial management." *Id.* at 153; see also Merrion, 455 U.S. at 141. Quoting an influential 1934 Interior Solicitor's opinion, the Court observed that, in the absence of congressional action to the contrary, the tribes' sovereign power to tax "may be exercised over members of the tribe and non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." Colville, 447 U.S. at 153, quoting *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934). Turning then to the search for any potential divestiture, the Court found none: "[T]he widely held understanding within Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power." 447 U.S. at 153.

In reaching its conclusion, the Colville Court adopted the reasoning of Buster v. Wright, 135 F. 947 (8th Cir. 1905), which involved the tribal regulation of non-members on fee lands within reservation boundaries. In Buster, deeds to individual lots in Indian territory had been granted to non-Indian residents, who incorporated cities and towns. As a result, Congress had expressly prohibited the Tribe from removing these non-residents from the reservation. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court upheld the Tribe's retained power to tax:

Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.

135 F. at 952. Working from this premise, the Colville Court also rejected the contention that tribal taxing powers have been "implicitly divested" by virtue of the tribes' "dependent status":

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights. . . . In the present cases, we can see no overriding federal interest that would *necessarily be frustrated* by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, *only the Federal Government, not the States.*

447 U.S. at 153-54 (emphasis added) (citations omitted).

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court followed Colville and upheld a tribal tax on non-Indians extracting oil from reservation lands pursuant to leases with the Jicarilla Apache Tribe. The Court recognized that the Jicarilla Apache Tribe has the authority to regulate non-members within its reservation boundaries based upon two separate powers: the Tribe's treaty "landowner" power to exclude non-members from its territory, and the Tribe's independent source of inherent tribal sovereign power to raise revenues and govern its territory. 455 U.S. at 137. The Court then examined relevant congressional action and found no explicit congressional divestiture of the Tribe's powers that gave rise to the power to tax. The mere fact that the Tribe gave up certain

"landowner" rights in the leases was insufficient to establish a divestiture of the Tribe's power to tax, particularly since a tribe's power to tax derives from its sovereign power to govern and manage its territory. *Id.* at 141. Again citing *Buster v. Wright*, the Court held that Congress's alienation of reservation land from tribal "ownership" did not divest the Tribe of its sovereign power to tax that land to raise revenues to support its territorial governance. *Id.*

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), this Court upheld the Tribe's exclusive authority to regulate hunting and fishing by all persons on the reservation, including non-members. The Tribe had treaty and inherent sovereign powers to regulate reservation resources, including its wildlife. *Id.* at 337. Significantly, the Court relied upon *Montana*, stating: "As to 'lands belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree' that a Tribe may 'prohibit non-members from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'" *Id.* at 331, quoting *Montana*, 450 U.S. at 557.¹⁴ The Court further determined that Congress had not divested the Tribe of jurisdiction. To the contrary, federal policy favored tribal self-government, which included the exclusive management of the Reservation wildlife resources.

In sum, Indian tribes are sovereign governments with vast responsibility to provide an array of governmental services to both tribal members and non-members on reservations. Since the early 1800s, this Court properly has been careful to limit the instances of intrusions into tribal inherent authority, thereby providing tribes the necessary latitude to provide those governmental services and protections. Absent clear congressional intent to limit tribal sovereignty, or an overriding national interest as that term has been previously defined by this Court, tribes retain inherent sovereign authority over their territory and all persons within it.

¹⁴In a distinction *amici* believe was dictum and unnecessary to decide the case, see Point II *infra*, this Court distinguished *Montana*, stating that *Montana* does not control questions concerning the exercise of tribal jurisdiction over non-members on tribal lands or tribal trust lands, because that decision involved fee lands that were alienated from tribal ownership. 462 U.S. at 330.

POINT II

THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THIS COURT'S HISTORIC TREATMENT OF TRIBAL JURISDICTION AND MUST BE REVERSED

Correct application of the foregoing authorities compels the conclusion that the Tribal Court of the Three Tribes has jurisdiction to hear Mrs. Fredericks' action against A-1 Contractors and Lyle Stockert. Of equal concern to the *amici*, proper construction of the relevant authority compels rejection of the Eighth Circuit's stingy view of tribal jurisdiction and a reaffirmation of the crucial role tribal courts play in the tribes' sovereign right and responsibility to protect all people with their territory.

A. On Its Facts, This Case Was Wrongly Decided.¹⁵

This Court need not and should not forge new ground in the annals of tribal jurisdiction. There is no need to create or resort to any broad rule. Based wholly on existing authority as interpreted by the Eighth Circuit, the Eighth Circuit erroneously applied that law to these facts.

Plaintiff Fredericks, although a non-member, is the widow and mother of enrolled tribal members and a longstanding resident of the Reservation. To put Mrs. Fredericks outside the protection of her family's tribe is a particularly odd and sad result. She and her tribal member children filed suit to recover damages for personal injuries sustained when Mrs. Fredericks' automobile collided with a gravel truck. The truck was driven by a non-member employee of a non-tribal company doing business on the Fort Berthold Reservation pursuant to a subcontract with a wholly-owned tribal entity. The

¹⁵*Amici* leave the laboring oar on this argument to Petitioners. Nonetheless, the facts of this case cry out so loudly for the assertion of tribal jurisdiction that *amici* are compelled at least to state the argument, no matter how sketchily.

automobile accident occurred within the Fort Berthold Reservation on a state highway constructed on the Three Tribes' trust lands pursuant to a right-of-way grant by the Secretary of the Interior pursuant to 25 U.S.C. § 323.

Looking first to congressional expression, Congress clearly has not acted to divest the Three Tribes of their powers to exercise civil jurisdiction over tort actions of this nature. The only conceivable congressional act implicated in this case is the federal statute that authorized the Secretary of the Interior to grant the right-of-way to establish the state highway where this accident occurred. This statute effected no divestiture. Its sole function was to authorize the Secretary to grant rights-of-way across tribal trust lands, subject to conditions prescribed by the Secretary and the consent of the tribe. 25 U.S.C. §§ 323, 324 (1983). Nothing in this scheme explicitly or implicitly divests a tribe of its sovereign right to exercise jurisdiction over land that remains wholly tribal territory.¹⁶

The Eighth Circuit held that, despite the lack of express congressional divestiture, this case was governed by Montana.¹⁷ Reading Montana to require *per se* general divestiture of tribal jurisdiction absent the presence of one of two "exceptions," the court held that the facts of the case here met neither of the exceptions and therefore required divestiture. *Amici* respectfully disagree, and believe that, even if the court correctly read Montana to establish only two situations permitting tribal jurisdiction (a proposition with which *amici* do not agree), the facts of this case positively leap off the page in their satisfaction of those conditions.

¹⁶Drawing upon the principles of property law, courts have compared grants of right-of-ways with the granting of an easement, which does not extinguish the underlying title. Application of Konaha, 131 F.2d 737 (7th Cir. 1942); In re Fredenberg, 65 F. Supp. 4 (D. Wis. 1946); State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. denied, 357 U.S. 918 (1958). Thus, the title and possessory interest in the land upon which the state highway is established pursuant to a rights-of-way remains vested in the Tribe. State v. Begay, 63 N.M. at 412, 320 P.2d at 1019.

¹⁷Montana v. United States, 450 U.S. 544 (1981), is addressed in greater detail *infra* at 21-30.

The Eighth Circuit read Montana to require divestiture except in the following two instances: (1) when non-members enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) when a non-member's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. A-1 Contractors v. Strate, 76 F.3d 930, 935 (8th Cir. 1996), quoting Montana, 450 U.S. at 565-66 (citations omitted). Although *amici* vehemently disagree that this was intended by Montana, nonetheless, the facts of this case meet both.

First, both plaintiffs and defendants here established domestic and commercial relationships that clearly reflect consensual conduct. Mrs. Fredericks resided on the Reservation for over forty years, and enjoyed the protections and programs of tribal government. Her five adult children, who are claimants in the action, are enrolled members of the Three Tribes, as was her deceased husband. The defendant contractor had entered into a contract with a tribal corporation to perform work on a tribal community building located on the Reservation. Its employee, the defendant driver, was driving the company truck on reservation land when he collided with Mrs. Fredericks. But for the defendant contractor's consensual relationship with the Three Tribes, this accident never would have occurred. Thus, through marriage, motherhood, and contract, these parties had consensually entered into personal and commercial relationships with a strong and foreseeable nexus to the Three Tribes and its territory.

Second, the non-members' conduct giving rise to this action has "some direct effect" on the general health and welfare of the Three Tribes. The Three Tribes surely have a health and safety interest in *all* persons' operation of motor vehicles on highways situated on the Reservation and their consequent liability. The ability of the Tribal Court to adjudicate an action relating to the operation of motor vehicles on highways running through the Reservation directly affects the Three Tribes' sovereign interests and responsibility to protect the

health and safety of its members.¹⁸ This sovereign interest equally extends to non-member residents and those who are compelled to enter the Reservation under contract, in addition to all those who voluntarily enter the Reservation for domestic or commercial purposes. In an on-reservation accident, tribal police and emergency vehicles typically, will respond to secure the roadway and transport the victims, regardless of race. Other tribal services likely would be required, such as counseling or temporary housing. And, here, tribal members and tribal programs certainly will be involved in Mrs. Fredericks' rehabilitation and future care, as she is inextricably involved in tribal life. Thus, the accident giving rise to this tort action directly affects the Three Tribes' interest in protecting the health and welfare of all those who enter its sovereign territory.

The Ninth Circuit recently applied the Montana factors differently--and correctly--on virtually identical facts. In Hinshaw v. Mahler, 28 F.3d 106 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994),¹⁹ the court upheld tribal court jurisdiction over a tort action arising from an on-reservation automobile accident. The individuals involved in the accident resided on the Reservation but were not members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. 42 F.3d at 1179-80. A tribal member and a non-member brought suit in tribal court, asserting wrongful death and survivorship claims on behalf of their deceased son against the non-Indian tortfeasor. Id. at 1180. The non-member defendant challenged the tribal court's jurisdiction. The tribal court concluded that it had jurisdiction because the accident occurred on the Reservation and because one of the plaintiffs was an enrolled tribal member, id., and that determination of jurisdiction was affirmed by the tribal appellate court and the United States District Court for the District of Montana. Id. at 1179-80.

¹⁸The Three Tribes explicitly exercises its civil jurisdiction by regulating certain civil traffic offenses on the Reservation, Code of Laws of the Three Affiliated Tribes, Ch. 4-A, including the seasonal use on all highways on the Reservation. Id., Ch. 28, §§ 1.02, 1.10, and 1.11.

¹⁹This decision is published at 42 F.3d 1178 (9th Cir. 1994).

Affirming tribal court jurisdiction, the Ninth Circuit cited Montana for the proposition that tribes retain civil authority over matters affecting the tribe. Id. at 1180. Relying upon Montana and National Farmers, the court concluded that "[c]learly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving non-members." Id. The Ninth Circuit went on to find that the Tribes' ordinance specifically provided for concurrent jurisdiction over certain civil matters on the reservation, including the operation of motor vehicles on public roads. Id. Thus, the Ninth Circuit correctly concluded that the Tribes' inherent authority supported the exercise of civil jurisdiction over the action, and the action fell squarely within the scope of the tribal ordinance conferring jurisdiction. The Eighth Circuit should have reached the same conclusion.

B. The Montana Decision And The Need For Clarification.

In 1981, this Court decided Montana v. United States, 450 U.S. 544 (1981). Like a hydra on hormones, that decision has spawned theories and "rules" that have grown far afield from their original context and do not necessarily flow logically from it. *Amici* believe that, properly viewed, Montana is but one in a long line of cases, not a watershed rule spelling the demise of tribal jurisdiction. Because, however, the myth of Montana has been so widely (and erroneously) read to introduce a nearly *per se* rule of implicit general divestiture, *amici* urge the Court to clarify what that decision in fact means.

In Montana, this Court was confronted with an apparently unfortunate and uniquely unwise exercise of civil authority by the Crow Tribe over non-member activities on fee lands located within the Reservation. The Crow Tribe enacted an ordinance that permitted members to fish and hunt on Reservation lands but completely prohibited non-members from fishing and hunting on Reservation lands, *including land owned in fee by non-members*. The record established that the State of Montana stocked the Reservation waters with fish, and the Tribe had not in the past challenged the state's "near exclusive" regulation of hunting and fishing on the fee lands. Nothing in the record suggested, much less established, that the prohibitory regulation related to the subsistence needs or welfare of the Crow Tribe.

This Court clearly and understandably was troubled by the inequitable and harsh prohibition imposed on non-members and drew upon its similar concerns in Oliphant.²⁰ While recognizing that Oliphant involved the exercise of tribal criminal jurisdiction over non-Indians, this Court nonetheless concluded that the general proposition of Oliphant had some bearing in the civil context: by submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to regulate non-Indian citizens of the United States except in a manner acceptable to Congress. 450 U.S. at 565. The exercise of civil jurisdiction over non-members in a manner that appears wholly arbitrary and capricious threatens the sovereignty of the United States and thus cannot be recognized as an inherent power of a dependent sovereign. Montana, 450 U.S. at 563-66. This concept presents no departure from established theory.

The Court next examined the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* (1983), and the Crow Allotment Act of 1920, 41 Stat. 751, and found no explicit divestment of the sovereign power to impose territorial regulation. 450 U.S. at 557-59. However, the Court *did* conclude that, by alienating the formerly tribal land to fee status, Congress intended to grant certain "landowner" powers of reasonable use and possession to the non-member fee holders. Going further, the Court concluded that the grant of those "landowner" powers necessarily divested tribes of the treaty power to exclude, *i.e.*, to exercise unbridled "landowner" powers over the non-member-owned fee lands. The Court viewed the tribal prohibition essentially as an improper exclusion of the non-members from their lands. *Id.* at 559.

As the above recitation demonstrates, nothing in the actual holding of Montana effected or requires the virtual obliteration of tribal jurisdiction over non-members. To the contrary, Montana reaffirmed the essential territorial aspect of tribal sovereignty by recognizing that, in spite of a congressional limitation on a tribe's treaty exclusion power, tribes nevertheless possess and retain inherent sovereign jurisdiction over non-member conduct on non-member-owned fee lands. In unnecessarily broad language that over the

course of time has become enshrined as a wholly unwarranted rule, the Court enumerated two instances where tribes clearly and undisputedly retain their inherent sovereign jurisdiction over non-members: (1) where non-members submit to tribal jurisdiction through a "consensual relationship," and (2) where non-members' activities on fee lands have "some direct effect" on a tribal interest in governing its members or territory. Neither of these instances is exhaustive, and both can be interpreted narrowly or broadly. 450 U.S. at 565-66. *Amici* submit that courts in general, and the court below in particular, have gutted tribal jurisdiction by giving the foregoing Montana factors an unnecessarily and unwarranted narrow interpretation.

C. Montana Has Been Misinterpreted and Misapplied.

1. Montana Does Not Support The Broad Rule Attributed To It.

Amici submit that Montana has been interpreted and applied in ways not intended by the Court or warranted by its facts. The resulting myth of Montana has caused confusion and great uncertainty. Respondents and the court below contend that this Court established a new rule of automatic, *per se* general divestiture. Articulating its view of that rule, the court below flatly maintains that "inherent sovereign powers do not extend to the activities of non-members." A-1 Contractors, 76 F.3d at 939. In this view, congressional action (or failure to act) is, for all practical purposes, irrelevant: a tribe may exercise civil jurisdiction over non-members only if it satisfies one of the two limited Montana "exceptions." *Id.*

The Eighth Circuit frankly admits that its interpretation of Montana "create[s] tension" with other of this Court's decisions, including Iowa Mutual, Williams, and Merrion. 76 F.3d at 938-39. To reconcile this tension, the Court fashioned a new, comprehensive, and integrated rule:

[A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over

²⁰Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

Id. at 939.

This "new" rule effectively abolishes tribal sovereignty. It deprives tribes of bedrock, certain powers over their territory and non-members. It proceeds from a presumption against tribal jurisdiction rather than a presumption in favor of its existence. It perpetuates the practice of chipping away at tribal powers by the careless use of unnecessary language, in this case by introducing the wholly unprecedented requirement of a "valid" tribal interest. And, most staggeringly, it renders Congress irrelevant. This rule distorts Montana and overturns over one hundred and fifty years of precedent.

Montana cannot serve as a springboard for so radical a rule. That case made no pretense of standing as controlling precedent for all determinations of tribal civil jurisdiction over non-members. Were Montana intended to be so read, Iowa Mutual and National Farmers would have been the perfect places to say so. Instead, rather than casting a determinative shadow over those cases, Montana appeared as minor, *supporting* authority.²¹ At neither its birth nor in later applications did this Court envision Montana as establishing a new rule of general applicability for all determinations of tribal jurisdiction over non-members. Rather, the lower courts have extended it far beyond its original contours and intent. Thus,

²¹In Iowa Mutual, this Court cited Montana as support for the general proposition that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. 480 U.S. at 18. In National Farmers, Montana appeared only in a footnote, as an example of the type of decisions this Court has made regarding the power of tribes to regulate the affairs on non-Indians on reservation lands. 471 U.S. at 851 n.12.

as matters now stand, Montana can be cited to support anything and everything and must be clarified.²²

2. Montana Fundamentally Was Concerned With Protecting Non-Members' Federal Constitutional Rights.

In order to assess what Montana really stands for, it is instructive to look closely at the subtext of what was really going on. Montana presented the Court with a troubling factual situation. A tribal regulation regulated different classes of on-reservation landowners differently: tribal members living on trust land were permitted to hunt and fish on their property; non-tribal members owning on-reservation fee land were entirely prohibited from hunting and fishing, even on the land they owned.

In federal constitutional terms, this apparent discriminatory treatment violated the non-members' Fourteenth Amendment equal protection rights. Tribes, however, are not bound by the Fourteenth

²²This confusion is manifest from the wildly varying analyses applied by a single circuit since issuance of the Montana decision. In Confederated Salish & Kootenai Tribes, et al. v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied sub nom. Polson v. Confederated Salish & Kootenai Tribes*, 459 U.S. 977 (1982), the Ninth Circuit interpreted Montana to uphold the tribes' power to regulate the conduct of non-Indians owning land bordering the lake beds designated as part of the reservation in the 1855 Treaty with the tribes. In Hinshaw v. Mahler, 42 F.3d 1178, 1180 (9th Cir.), *cert. denied*, 115 S. Ct. 485 (1994), the court upheld the tribe's exercise of jurisdiction over a tort action in a case virtually identical to the case at bar, relying on Montana as support for the proposition that "[c]learly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving non-members." In Yellowstone County v. Pease, No. 95-36026, 1996 WL 512363 (9th Cir. Sept. 11, 1996), the court relied on Montana (and the Eighth Circuit's decision below) to deny tribal court subject matter jurisdiction over an action challenging a county's right to impose property taxes on reservation land held in fee by a member of the tribe. Id. 1996 WL 512363, at *5, citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

Amendment (or, indeed, by the Constitution at all).²³ Faced with an unacceptable deprivation of United States citizens' constitutional rights, this Court had to find a way to protect those rights.

The Court had faced an identical concern in Oliphant, where, because of the non-applicability of the U.S. Constitution to tribes, the Tribal Court was not required to and did not provide criminal defendants with certain constitutional safeguards that federal and state courts provide. Unwilling to permit the Tribal Court to deprive non-member citizens of protections analogous to their federal constitutional rights, the Court found that Congress had intruded on the sovereignty of tribes in the criminal context by asserting federal jurisdiction over certain crimes, such as the Major Crimes Act, 18 U.S.C. § 1153 (1996 Supp.). More squarely, the Court made it clear that the protection of national citizens under the Bill of Rights, especially in the context of criminal matters, is a paramount national interest, and that any unremedied tribal action that deprives a citizen of such a right conflicts with the "overriding sovereignty" of the federal government. Oliphant, 435 U.S. at 209.

Faced in Montana with the Crow Tribe's unacceptable deprivation of the non-member residents' equal protection right to hunt and fish on their property, the Court looked to Oliphant as its analytical model.²⁴ First it searched for a congressional enactment that might be interpreted as withdrawing tribal power. It found such limited authority in the General Allotment Act, 25 U.S.C. §§ 331 *et seq.* (1983) and the Crow Allotment Act of 1920, 41 Stat. 751. By these Acts, Congress had withdrawn certain tribal land and opened it up to alienation to non-tribal members. In the Crow case, the allotments remained within the exterior boundaries of the Crow

²³Instead, tribes are bound by the Indian Civil Rights Act, which offers constitutional-type protections and contemplates remedies in tribal forums. Tribal Constitutions often offer similar protections.

²⁴The Montana record is unclear as to why the non-members did not challenge the Tribe's action under the Indian Civil Rights Act, as this law prohibits tribes from denying any person the equal protection of the tribal laws. Montana may not have been necessary if the non-members had exhausted their tribal remedies.

Reservation, thus remaining part of the Reservation and, as conceded by the Court, still subject to tribal regulation.

Looking to the General Allotment Act, the Court concluded that, by enabling non-members to obtain fee title to land within the Reservation, Congress had indeed intended to withdraw from the tribes certain treaty powers as "landowner" over that land. Specifically, the Tribes' power under the 1868 treaty to restrict or prohibit non-Indian hunting and fishing on the Reservation, as an exercise of their right to exclude, could no longer apply to lands held in fee by non-Indians. Montana, 450 U.S. at 559. Notably, however, as an exercise of their right to exclude, the only powers Congress withdrew were the tribes' "landowner" possessory rights, thereby divesting tribes of their right to remove non-members from fee lands within the reservation or to prohibit absolutely their use. The General Allotment Act did not divest tribes of their *sovereign, regulatory* power over the fee lands within their territory.

Recognizing that Congress's divestiture of certain "landowner" treaty powers did not withdraw tribes' sovereign regulatory power over non-members on fee lands within reservation territory, this Court drew upon Oliphant to provide a means for full protection of the United States citizens' rights against the discriminatory tribal regulation. *Id.* at 565. Specifically, Oliphant supports the general proposition that a tribe lacks inherent power to impose discriminatory tribal regulation, unless either non-members submit to tribal jurisdiction through their activities or the regulation has some rational relationship to a tribal government interest. *Id.* at 565-66. Absent those circumstances, discriminatory regulation is "necessarily inconsistent" with the overriding national interests.

Thus, Montana is wholly consistent with Oliphant in its view that it is beyond the power of a tribal government to deprive a non-member of a federal constitutional right. The real problem with Montana is that an arguably valid concern about a violation of non-members' constitutional right to equal protection could have been directly addressed without taking the drastic step of implicitly divesting the tribe of jurisdiction in all circumstances. *Amici* submit that the Court had available to it, and should have relied on,

remedies afforded by Congress to protect the constitutional rights of non-members.²⁵

That remedy lay in the Indian Civil Rights Act. Rather than appearing to strip the tribe of its inherent power to regulate the land and landowners within its reservation territory,²⁶ the Court could and should have held that the non-members' complaint about discriminatory regulation stated a claim under the ICRA and should have been heard, in the first instance, by the tribal court.²⁷

The ICRA serves the dual purpose of facilitating tribal sovereignty and self-government, while insuring that tribal government is exercised in a manner largely consistent with the federal constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978). While the ICRA does not incorporate each and every protection of the federal constitution, it unambiguously does impose

²⁵For the sake of this argument only, *amici* assume that Montana intended to nullify the ICRA and gut tribal jurisdiction over non-members unless the tribe could establish one of the two enumerated "exceptions."

²⁶*Amici*, like many lower courts, have frankly no idea what principle this Court intended to announce in Montana. The case was so fact specific that it is impossible to tell which of the several variables--unconstitutionally discriminatory conduct, occurring on fee (versus trust) land, directed against non-members--the Court found determinatively significant. What *amici* do believe is that, given the confluence of potentially significant facts, the use of Montana as a springboard for a broad general rule is misguided.

²⁷Such a holding would not have conflicted with Oliphant. In Oliphant, compelling tribal compliance with and adjudication of a claim arising under the ICRA could not have fully protected a non-member criminal defendant, no matter how exemplary tribal enforcement, because the ICRA does not incorporate wholesale all of the U.S. Constitution's criminal safeguards. For example, even vigorous compliance with and enforcement of the ICRA could not guarantee a non-member criminal defendant of his Fifth Amendment right to a grand jury or Sixth Amendment right to counsel. Thus, tribal jurisdiction would be futile and exclusive federal jurisdiction was the only way to ensure a non-member defendant of his or her full measure of federal constitutional protection. That is *not* the case with the equal protection problem in Montana, because the ICRA does guarantee all persons within the reservation, non-members included, the full scope of due process and equal protection.

on tribal governments the obligation to extend due process and equal protection to each and every person within tribal territory. 25 U.S.C. § 1302(8). Thus, the discriminatory regulation challenged in Montana was fully cognizable under the ICRA. The Court could, and *amici* submit should, have remitted the case to tribal court first for determination under ICRA.

Amici submit that egregious situations like those presented in Oliphant and Montana can be fairly dealt with in an intellectually honest fashion with only slight fine-tuning to the Montana "rule." Specifically, *amici* submit the following test for inherent tribal jurisdiction over non-members for activities occurring on-reservation, whether on fee or trust lands:

Tribes are presumed to have regulatory and adjudicatory jurisdiction over their territory and all persons living or conducting business or otherwise present within their territory, whether member or non-member, whether tribal trust land or fee land, *unless* either (i) Congress has expressly withdrawn the particular power asserted, or (ii) the tribe's exercise of such power over a non-member necessarily would conflict with an overriding national interest.

The potential violation of a non-member's federal constitutional rights would *not* necessarily constitute such an overriding national interest. To the extent that such a violation may be remedied in the tribal court in a suit under the ICRA, the national interest is served. The tribe has a valid interest in governing its territory and persons within its territory, and it tempers that interest by providing a tribal remedy in a tribal forum for violation of federal constitutional rights. Both the tribal and the national interests are served. Only (i) if the particular case raises a constitutional violation that by definition cannot be redressed through the ICRA (such as the right to a grand jury), or (ii) if the particular tribe does not provide a tribal forum to enforce compliance with the ICRA, does the "overriding national interest" require a federal remedy for vindication of such rights. Rather than strip the tribe of its jurisdiction over non-members, such a theory essentially pre-empts tribal jurisdiction in favor of the paramount federal interest.

The above theory would satisfactorily ensure a federal forum for egregious cases where fair justice simply cannot be done in a tribal court, while preserving the sovereignty and integrity of the tribal government. In the instant case, the theory also would require reversal of the Eighth Circuit's decision. There being no express congressional withdrawal of tribal power, nor any overriding national interest requiring implicit divestiture, the tribal court retained its inherent, sovereign jurisdiction to adjudicate Mrs. Fredericks' tort claim against A-1 Contractors and Lyle Stockert. *Amici* respectfully ask this Court to clarify Montana by adopting the above rule.

CONCLUSION

Based upon foregoing, *amici curiae* ask this Court to reverse the majority decision of the court below, reject the "comprehensive and integrated rule" applied by that court, and clarify its holding in Montana to reaffirm the presumption of tribal jurisdiction over non-members within the exterior boundaries of the reservation, absent express congressional withdrawal of such jurisdiction or a clearly paramount national interest.

Dated: Albuquerque, New Mexico
November 11, 1996

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Supreme Court, U.
F I L E D

No. 95-1872

NOV 12 1996

IN THE

CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL
JUDGE OF THE TRIBAL COURT OF THE THREE AFFILI-
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KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS;
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STANDING ROCK SIOUX TRIBE, *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

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27 p/2

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
TRIBAL COURTS RETAIN ADJUDICATORY JURISDICTION TO RESOLVE A CIVIL TORT ACTION BETWEEN NON-INDIANS ON A RES- ERVATION HIGHWAY	4
A. This Court Has Long Held That Tribal Courts Have Authority as Part of Tribes' Inherent Sovereignty To Adjudicate Civil Disputes That Arise on Reservations Involving Non-Indians....	4
B. Congress Has Encouraged Tribal Courts To Develop and Operate Effectively, and Assumed These Courts Exercise General Civil Adjudica- tory Jurisdiction Over Non-Indians	8
C. The Exercise Of General Jurisdiction To Adjudi- cate Civil Disputes Arising on a Sovereign's Territory Whether Involving Citizens or Non- citizens Is an Essential Attribute of Sovereignty for Tribes as Well as Other Governments	12
D. <i>Montana</i> , <i>Brendale</i> and <i>Bourland</i> Do Not Pre- clude Exercise of Tribal Civil Adjudicatory Jurisdiction in This Case	18
E. Applying the <i>Montana</i> Test, the Tribal Court Had Jurisdiction Over the Action	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:	Page
<i>Allstate Ins. Co. v. Hague</i> , 449 U.S. 302 (1981).....	3, 12, 13
<i>Brendale v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	3, 18, 19
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	14, 15
<i>Carroll v. Lanza</i> , 349 U.S. 408 (1955)	3, 13
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821)	12
<i>Colorado River Water Cons. Dist. v. United States</i> , 424 U.S. 800 (1976)	18
<i>Duro v. Reina</i> , 496 U.S. 676 (1990)	7, 8, 14, 20
<i>Hartford Fire Ins. v. California</i> , — U.S. —, 125 L.Ed.2d 612 (1993)	20
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	2, 7, 8, 18
<i>Kerr-McGee Corp. v. Navajo Tribe</i> , 471 U.S. 195 (1985)	6
<i>McClanahan v. Arizona State Tax Comm'n.</i> , 411 U.S. 164 (1973)	5
<i>McKenna v. Fisk</i> , 42 U.S. (1 How.) 241 (1843)....	13
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	6, 14
<i>Montana v. United States</i> , 450 U.S. 544 (1981) ..	3, 6, 18, 19, 20, 21
<i>Morris v. Hitchcock</i> , 194 U.S. 384 (1904)	6
<i>National Farmers Union Ins. Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	2, 6, 7
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	3, 13
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	14, 15
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	5
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	2, 5
<i>South Dakota v. Bourland</i> , 508 U.S. —, 124 L.Ed.2d 606 (1993)	3, 18, 19
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896)	4
<i>Thomas v. Washington Gas Light Co.</i> , 448 U.S. 261 (1980)	13

TABLE OF AUTHORITIES—Continued

	Page
<i>Three Affiliated Tribes v. Wold Engineering</i> , 476 U.S. 877 (1986)	12, 17, 21
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975).....	5
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913).....	14
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	8, 15
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S. 134 (1980)	6
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	15
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	2, 4, 5
Acts and Statutes:	
Indian Civil Rights Act of 1968	
25 U.S.C. § 1301 <i>et seq.</i>	8
25 U.S.C. § 1302	8
25 U.S.C. § 1302 (8)	21
25 U.S.C. § 1311	8
Indian Tribal Justice Act	
25 U.S.C. § 3601 <i>et seq.</i>	2, 9
25 U.S.C. § 3601 (4)	9, 14
25 U.S.C. § 3601 (5)	3, 10, 14
25 U.S.C. § 3601 (6)	9, 14
25 U.S.C. § 3611	9
25 U.S.C. § 3611 (e)	9
25 U.S.C. § 3613	9
25 U.S.C. § 3621 (a)	9
25 U.S.C. § 3621 (b)	9
Public Law 102-137	8
Congressional Materials:	
Conf. Rep. No. 103-383, 103d Cong., 1st Sess. (1993)	10
H. Rep. No. 103-205, 103d Cong., 1st Sess. (1993) ..	9, 10
S. Rep. No. 103-88, 103d Cong., 1st Sess. (1993) ..	9, 10, 11
139 Cong. Rec. H10262 (1993)	9
139 Cong. Rec. S9176 (1993)	11

TABLE OF AUTHORITIES—Continued

<i>Miscellaneous:</i>	Page
HENRY M. HART, JR. and ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAK- ING AND APPLICATION OF LAW (Eskridge and Frickey, ed. 1994)	12
CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW (Yale University Press 1987)	19

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STANDING ROCK SIOUX TRIBE, *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

Amici are all federally-recognized Indian tribes. All *Amici* tribes have established businesses and economic activities on their reservation lands in recent years in an effort to promote economic development. On all *Amici* reservations, *Amici* tribes have established tribal courts to enforce applicable laws and resolve disputes arising on reservation lands. Non-Indians are frequently present on

reservation lands as residents or in connection with employment, leases or contracts with tribal governments and enterprises, or as patrons of tribal businesses. With increased commercial activity occurring on Indian lands in recent years, *Amici* have experienced a substantial increase in civil cases involving non-Indians in their tribal courts. *Amici's* tribal courts regularly hear and resolve such cases. Therefore, *Amici* have an interest in a recognition of their sovereign authority to establish and maintain tribal courts to adjudicate disputes involving non-Indians. *Amici* consider such a recognition critical to a well ordered civil society and to promoting economic development in *Amici's* reservation communities.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. For decades, this Court has held that tribal courts have civil adjudicatory jurisdiction over cases involving non-Indian parties. *E.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Williams v. Lee*, 358 U.S. 217 (1959). As the Court stated in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted), "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." In *LaPlante*, the Court held that civil jurisdiction over cases arising on a reservation involving non-Indians "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18.

2. Congress has "consistently encouraged . . . [the] development" of tribal courts. *LaPlante* at 14-15 and n.6. In 1993, for example, Congress enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, *inter alia*, to pro-

vide federal funding support for tribal courts equal to that of equivalent state courts. In the 1993 Act, Congress recognized that, as this Court held in *LaPlante*, the general rule is that civil jurisdiction over cases arising on a reservation presumptively lies in tribal courts, and found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5).

3. The authority of a sovereign to adjudicate civil disputes arising on its territory is an essential attribute of sovereignty, even if the cases involve visitors. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). Tribes have the same need for civil adjudicatory authority as any other sovereign to ensure persons who enter their reservations to reside, or do business, with tribal entities or members can rely upon a stable legal system available to resolve disputes that may arise concerning them. Otherwise, tribes will be unable to achieve economic self-sufficiency for their members, or to provide for the welfare of all reservation residents and visitors.

4. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1992) and *South Dakota v. Bourland*, 508 U.S. —, 124 L.Ed.2d 606 (1993), do not apply to determinations of tribal court authority in civil cases involving only non-Indian parties. Those cases involve statutes where Congress divested tribes of title to lands and intended to abrogate tribes' regulatory authority over non-Indians purchasing or entering those lands pursuant to the invitation of Congress. By contrast, Congress has repeatedly demonstrated the intent to protect and support tribal court authority to adjudicate civil cases involving non-Indians. Moreover, the circumstances of

the non-Indian parties in this case—a long-time reservation resident related to tribal members and a contractor entering the reservation to do business with the Three Affiliated Tribes—are very different from homesteaders purchasing former tribal lands under a statutory scheme where Congress intended ultimately to dissolve tribal relations and the authority of tribal governments and to assimilate tribal members.

5. Even if the standards of *Montana* apply here, tribal civil authority exists because both non-Indian parties here have entered into consensual relationships with the Three Affiliated Tribes, and the activities of the non-Indian Respondents are claimed to have threatened the public health, welfare and safety of the Tribes and tribal members by operating an automobile on reservation roads in a manner that endangered persons and property.

ARGUMENT

TRIBAL COURTS RETAIN ADJUDICATORY JURISDICTION TO RESOLVE A CIVIL TORT ACTION BETWEEN NON-INDIANS ON A RESERVATION HIGHWAY.

A. This Court Has Long Held That Tribal Courts Have Authority as Part of Tribes' Inherent Sovereignty To Adjudicate Civil Disputes That Arise on Reservations Involving Non-Indians.

It has been settled for at least 100 years that tribes have authority to establish courts on reservations as part of their own inherent sovereignty, separate and independent from federal authorization. *Talton v. Mayes*, 163 U.S. 376 (1896). In *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that tribal courts have jurisdiction exclusive of state courts over a civil suit by a non-Indian reservation trader to collect a debt from an Indian, because "the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. *Williams* con-

clusively sustains a tribal court's authority to determine disputes involving a non-Indian party. *See also McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 179 (1973) ("cases applying the Williams test have dealt principally with situations involving non-Indians"). As the Court stated in *Williams*: "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Id.* at 223 (citations omitted).

The Court concluded in *United States v. Mazurie*, 419 U.S. 544, 557 (1975), that "Indian tribes within 'Indian country' are a good deal more than 'private voluntary organizations,' " but rather "are unique aggregations possessing attributes of sovereignty over both their members and their territory," and relying upon *Williams v. Lee*, affirmed tribal authority over non-Indians. *Id.* at 558. It was thus well established two decades ago that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted).

By contrast, the Court decided in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209-12 (1978), that tribal courts' criminal jurisdiction over non-Indians had been implicitly divested because of tribes' incorporation into and dependency upon the protection of the United States. The Court in *Oliphant* carefully examined numerous statutes and treaties in which Congress had repeatedly assumed that tribes did not have criminal jurisdiction over non-Indians. *Id.* at 197-99 and n.8, 201-08. For example, the Court relied upon statutes in force since 1817 that extend federal enclave law to confer jurisdiction on federal courts to punish crimes committed in Indian country by non-Indians with Indian victims. *Id.* at 201, 203.

This Court's decisions subsequent to *Oliphant*, however, have adhered to the Court's tradition of protecting tribal

courts' civil adjudicatory authority recognized in *Williams v. Lee* and other earlier cases.¹ In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854 (1985), the Court held that "[f]or several reasons, . . . the reasoning of *Oliphant* does not apply" to bar tribal courts from adjudicating civil suits with non-Indian parties. First, the Court observed that in contrast to Congress' creating federal criminal jurisdiction over non-Indians committing crimes on reservations, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *Id.* The Court also

¹ The Court has also sustained tribes' power in other civil areas—to tax non-Indians doing business on reservation trust lands, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 159 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985), and to regulate hunting and fishing by non-Indians on trust lands. *Montana v. United States*, 450 U.S. 544, 557 (1981). These cases followed, and some of them specifically relied upon, the Court's much earlier decision sustaining a tribal permit tax imposed on non-Indians in *Morris v. Hitchcock*, 194 U.S. 384 (1904). See *Merrion*, 455 U.S. at 142; *Colville*, 447 U.S. at 153.

The Court in *Colville* relied upon opinions by "Executive Branch officials . . . [that] consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest," *id.* at 152, and observed that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and that "[n]o federal statute . . . shows any congressional departure from this view." *Id.* at 153. The Court held that "[i]n these respects the present cases differ sharply from *Oliphant* . . . in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Id.* Thus, the Court concluded in *Colville* that tribal civil powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Id.* In *Merrion*, the Court relied on *Colville* to hold that "[t]he power to tax is an essential attribute of Indian sovereignty," 455 U.S. at 137, and "an inherent power necessary to tribal self-government and territorial management." *Id.* at 141.

relied on an Attorney General's Opinion in the mid-nineteenth century concluding that tribes had no criminal jurisdiction over non-Indians but did retain the power to determine civil controversies arising on their reservations. *Id.* at 854-55. The Court therefore concluded that "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case . . . [involving a tort committed on an Indian child on reservation fee lands] is not automatically foreclosed" by implication as a result of the incorporation of tribes into the United States as domestic dependent sovereigns. *Id.* at 855. In *National Farmers Union*, the Court held that examination of the tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself," *id.* at 856, and the federal court should stay or dismiss a case over which it has jurisdiction until that examination is completed. *Id.* at 857.

Two years later in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the Court confirmed that tribal courts "presumptively" have subject-matter jurisdiction over civil cases involving non-Indians on a reservation, because "[t]ribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty," *id.* at 18, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (citation and footnote omitted). Since the Court had already held in *National Farmers Union* that tribal court civil adjudicatory jurisdiction over activities by non-Indians on reservations—unlike the criminal jurisdiction precluded in *Oliphant*—is not "automatically foreclosed" by tribes' dependent status vis-a-vis the United States, the Court in *LaPlante* concluded that such jurisdiction "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.²

² This Court subsequently observed in *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (citations omitted):

[o]ur decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve

The only difference between the present case and *National Farmers Union* and *LaPlante* is that in those cases one party was a tribal member. Respondents did not contend below that any statute or treaty provision specifically divests the Three Affiliated Tribes of authority to establish tribal courts of general jurisdiction to resolve a tort case involving only non-Indians on reservation lands. The tribal court of appeals held there is no action of Congress or treaty that has done so. (Jt. App. at 35.) Accordingly, under *LaPlante* and predecessor decisions of this Court dealing with tribal court civil jurisdiction, the tribal courts of the Three Affiliated Tribes retain that authority. This result is supported as well by the treatment Congress has given to tribal court civil jurisdiction, which we discuss in the next section.

B. Congress Has Encouraged Tribal Courts To Develop and Operate Effectively, and Assumed These Courts Exercise General Civil Adjudicatory Jurisdiction Over Non-Indians.

As the Court noted in *LaPlante*, 480 U.S. at 14-15 and n.6, Congress has "consistently encouraged . . . [the] development" of tribal courts. For example, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*, required tribal courts to adhere to most requirements of the Bill of Rights, provided special training for tribal judges and directed the Interior Department to prepare a model code to govern the tribes' administration of justice. 25 U.S.C. §§ 1302, 1311. Public Law 102-137 altered the result of this Court's decision in *Duro v. Reina*, 495 U.S. 679 (1990), to confirm tribes' inherent criminal jurisdiction over Indians of other tribes.³

civil disputes involving nonmembers, including non-Indians

³ See also *United States v. Wheeler*, 435 U.S. 313, 325 (1978):

[I]n 1854 Congress expressly recognized the jurisdiction of tribal courts when it added another exception to the General Crimes Act, providing that federal courts would not try an Indian 'who has been punished by the local law of the tribe'

Most recently, Congress in 1993 enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, establishing a special Office of Tribal Justice Support within the Bureau of Indian Affairs to provide funds, training and technical assistance to tribal court systems. *Id.* at § 3611. It also established a new system for base support funding for tribal justice systems, *id.* at § 3613, and authorized \$50 million a year to be appropriated for this purpose, *id.* at § 3621(b)—which was about *four times* the amount of prior federal support provided to tribal courts. H. Rep. No. 103-205, 103d Cong., 1st Sess. 27 (1993) (hereafter "House Report"); S. Rep. No. 103-88, 103d Cong., 1st Sess. 3 (1993) (hereafter "Senate Report"). This increased funding was intended to implement recommendations of the United States Commission on Civil Rights to authorize spending for tribal courts in amounts equal to that of equivalent state courts. 139 Cong. Rec. H10262 (remarks of Representative Miller, Chairman, House Committee on the Interior and Insular Affairs). In addition, \$7,000,000 per year were authorized to, *inter alia*, assist tribal courts to develop tribal codes and rules of procedure, tribal court administrative procedures and court records management systems, and tribal standards for judicial administration and conduct. 25 U.S.C. §§ 3611(e), 3621(a).

In the 1993 Act itself, Congress specifically found that "Indian tribes possess the inherent authority to establish . . . tribal justice systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(4) and (6). The Senate Report makes it clear that the latter finding "was added to emphasize that tribal courts are permanent institutions charged with resolving

. . . . Thus, far from depriving tribes of their sovereign power to punish offenses against tribal law by members of the tribe, Congress has repeatedly recognized that power and declined to disturb it.

the rights and interests of both Indian and non-Indian individuals." Senate Report at 8. The House Report echoed this understanding, relying on *LaPlante*, that:

As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it [sic] controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court.

* * * *

The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. (1987) at 18.

House Report at 8-9.⁴

When it enacted the Indian Tribal Justice Act, Congress also expressly found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5). This finding was added to the Act by the Senate Committee on Indian Affairs:

to reflect the decision of the United States Supreme Court in the case of *Montana v. United States*, 450 U.S. 544 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents

⁴ The Conference Committee Report likewise stated:

The Conferees recognize the long standing principle that Indian tribes retain all sovereign authority not expressly divested by the Congress. This principle was articulated by the Supreme Court in *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9 (1987). The Supreme Court recognized that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' 480 U.S. 9 (1987) at 18.

Conf. Rep. No. 103-383, 103d Cong., 1st Sess. 13 (1993) (footnote omitted).

and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.

Senate Report at 8.

More broadly, the Senate Report concluded that:

Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except where the Congress has established that federal jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. . . .

* * * *

It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments.

Senate Report at 3. As Senator Inouye, Chairman of the Senate Indian Committee, told the Senate when he presented the Indian Tribal Justice Act to the floor.

While it is a bill that reflects compromise, more fundamentally, it represents the preservation of the sovereign authority of tribal governments to determine the future of their tribal justice systems. Sovereign nations, no matter how limited or expansive their sovereignty might be, can only exercise that sovereignty through the legal systems they develop to implement civil and criminal codes and to enforce regulatory provisions.

139 Cong. Rec. S9176 (1993).

C. The Exercise of General Jurisdiction To Adjudicate Civil Disputes Arising on a Sovereign's Territory, Whether Involving Citizens or Noncitizens, Is an Essential Attribute of Sovereignty for Tribes as Well as Other Governments.

The actions of Congress and this Court protecting the authority of tribes to establish courts exercising general civil adjudicatory jurisdiction over reservations are complemented by this Court's more general recognition of the interests any sovereign has in providing a forum for resolution of disputes arising on that sovereign's territory but involving noncitizens. Chief Justice Marshall long ago noted the importance to the functions of a government of making courts available for the resolution of disputes and enforcing the law, observing:

No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821); see also *Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law* 342-43 (Eskridge and Frickey, ed. 1994) (noting the dispute settlement function of courts is important "to the good ordering of society"). Indeed, "[t]he federal interest in ensuring that all citizens have access to the courts is obviously a weighty one." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 888 (1986).

This Court has also recognized in the context of choice-of-law cases the interests of a sovereign in providing a judicial forum for the resolution of disputes and applying its law to such actions, even those disputes involving transitory tort claims. See, e.g., *Allstate Ins. Co. v. Hague*,

449 U.S. 302 (1981); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *McKenna v. Fisk*, 42 U.S. (1 How.) 241 (1843). It has determined that a sovereign has an interest in enforcing the legal rights of all those in its territory, residents and nonresidents, who suffer from the negligence of another. *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (state has an interest in "providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'") (citation omitted); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (state has interest in "opening her courts" to suits brought by nonresidents injured while temporarily employed in state and "to apply its own rule of law to give affirmative relief for an action arising within its borders").

Accidents on highways implicate the interests of a government in promoting safety on its roads for all who use them. See *Allstate*, 449 U.S. at 314 (state has valid concern for safety and well-being of nonresidents temporarily in state); *Washington Gas Light*, 448 U.S. at 277 (same). An accident may highlight other social problems that concern the sovereign, such as high rates of drug or alcohol use among drivers, underage drivers, or uninsured drivers. They may also indicate a need for safety belt laws, child restraint requirements, or modifications in the roads or road signage. Accidents also implicate the government's interest because they frequently require governmental services to address the effects of such accidents. The injured may require ambulance services, medical attention, or other services. See *Allstate*, 449 U.S. at 314 (nonresidents injured in state "may call upon state facilities in appropriate circumstances"); *Carroll*, 349 U.S. at 413 (state where tort involving nonresidents occurs "certainly has a concern in the problems following in the wake of the injury"). Thus adjudication of disputes arising out of accidents is important for the development and enforcement of governmental policy. See *Nevada*, 440 U.S. at 424; *Carroll*, 349 U.S. at 413.

These consequences and impacts are as true for tribes as for any other government. Tribes today do not usually live "in separate and isolated communities, adhering to primitive modes of life." *United States v. Sandoval*, 231 U.S. 28, 39 (1913). Instead, tribes engage in major commercial ventures to attract non-Indians to their reservations to do business and interact with the tribal community. For example, *Amicus* Assiniboine and Sioux Tribes and Indian allottees on its reservation derive major revenues from leasing trust lands to non-Indian companies which produce several million dollars worth of oil annually. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *Amici* Ho-Chunk Nation, St. Croix Band of Chippewa Indians, Confederated Tribes of the Colville Reservation ("Colville Tribes"), and Standing Rock Sioux Tribe operate gaming casinos and related recreational establishments on reservation lands. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Other tribes promote tourism. *E.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). *Amicus* Colville Tribes operate numerous enterprises related to their timber resources which employ hundreds of individuals on the reservation, including non-Indians. The Colville Tribes also frequently enter into contracts with non-Indian businesses on the reservation in connection with their forestry enterprises. A great many residents on *Amici's* reservations are non-Indians or Indians of other tribes who have married tribal members, like the plaintiff who filed this case, or are employed by the tribe or federal agencies serving the tribe. *Cf. Duro v. Reina*, 495 U.S. 676, 695 (1990).

As Congress found in the Indian Tribal Justice Act, 25 U.S.C. § 3601(4), (5) and (6), the availability of tribal forums to resolve civil disputes in an effective and predictable fashion is essential if the tribes are to maintain a reservation environment that can attract non-Indians to engage in business, lease trust lands, recreate upon or tour the reservation and thereby fulfill the congressional

purpose of promoting tribal economic development.⁶ As the Court recognized in *Cabazon*, 480 U.S. at 219, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." A necessary condition for reaching these goals is a stable reservation legal environment where those civil disputes which will inevitably arise can be fairly and efficiently resolved. As the Court observed in *United States v. Wheeler*, 435 U.S. 331-32 (1978)—albeit in the different context of tribal court criminal jurisdiction over tribal members—tribes "have a significant interest in maintaining orderly relations" and "tribal courts are important mechanisms for protecting significant tribal interests."

This is why today tribes have found it essential to establish tribal courts with general jurisdiction to resolve civil disputes brought before them that arise on the reservation. On all of *Amici* tribes' reservations, the tribal courts, including appellate courts, routinely and successfully adjudicate cases involving non-Indian parties. For example, since June 1995, approximately 94 civil cases have been filed in the tribal court of *Amicus* Ho-Chunk Nation. In 25 cases the plaintiff was a non-Indian, seven of which have been resolved in whole or part in favor of the plaintiff and three in favor of the defendant. In 1995, the tribal court of *Amicus* Assiniboine and Sioux Tribes heard 84 cases in which the plaintiff was a non-Indian. In 58 of those cases, the court issued judgment in favor of the non-Indian plaintiff. The tribal court also heard

⁶ This Court has repeatedly held that economic development is a major goal of Congress' Indian policy. *E.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development'"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self sufficiency and economic development").

16 cases in which the defendant was a non-Indian, and the court dismissed the action or entered judgment in favor of the non-Indian in eight of those cases. The tribal court of *Amicus* Colville Tribes heard several hundred civil cases, many involving non-Indian parties, in the last year. The Colville Tribes have recently entered into an agreement with the State of Washington providing for modification and enforcement of child support awards against tribal members in tribal court, and it is expected that the State will file hundreds of cases next year in tribal court as the plaintiff. The tribal court of *Amicus* Standing Rock Sioux Tribe also regularly hears suits brought by non-Indians, including actions involving debt collection, repossession of automobiles, livestock trespass, child support, and paternity. The tribal court recently heard a suit brought by a subdivision of North Dakota, Sioux County, against an Indian employee of the County for damages. Many if not most judges in the tribal courts maintained by *Amici* are trained lawyers. The tribal courts, of course, apply the pertinent law to any case where they have jurisdiction—whether the source of that law is tribal, federal or state.

Non-Indians entering a reservation to do business with a tribe—like the Respondents in this case—and non-Indians residing on a reservation as a widow and mother of tribal members—like the non-Indian Petitioner in this case—often expect, indeed depend upon, the existence of a stable legal system and tribal court to resolve any civil dispute that may arise concerning their activities. If, as happened here, a non-Indian driving on the reservation collides with another non-Indian, the accident is typically investigated by tribal police, witnessed by Indians who reside on the reservation, and any injuries are treated at least initially by the tribal health clinic.⁶ Evidence needed at

⁶ Since, as the tribal court noted, "the Court is faced with a somewhat bare record on the facts of this case," (Jt. App. at 20), because the issue of jurisdiction was appealed to the federal courts

trial is thus commonly possessed by Indians on the reservation, often far from (and, indeed, beyond the subpoena powers of) the nearest state court. For example, on the Colville reservation the tribal court is significantly closer to most locations on the reservation than state courts, which are located as far as fifty miles from the reservation boundary. In these circumstances, a non-Indian plaintiff may understandably prefer resolution of the case in tribal court. To hold that the tribal court *cannot* adjudicate such a case filed by a non-Indian plaintiff—when it would have exclusive subject-matter jurisdiction under *Williams v. Lee* if an Indian were the defendant—would frustrate both the plaintiff's choice of the most convenient forum and the sensible administration of justice.

Moreover, a non-Indian like the Respondent who knowingly drives a car on a reservation knows that if he or she is involved in an accident, a victim may very well be an Indian, in which case adjudication of any tort case will almost surely be in the tribal court. This is so because *LaPlante* teaches that the tribal court presumptively has jurisdiction over the case if the plaintiff is a tribal member, and *Williams v. Lee* teaches that the tribal court would have jurisdiction exclusive of state courts where an Indian is a defendant. Indeed, a non-Indian driving on the reservation may foreseeably be involved in an accident involving *both* Indian and non-Indian victims—either a multi-car accident or an accident with a non-Indian driver (say this non-Indian Petitioner) and Indian passengers (say her children, who are enrolled tribal members). In such a situation, as noted, *Williams v. Lee* holds that a state court would have no jurisdiction over the Indians (absent their voluntary filing suit in state court as plaintiffs, see *Three Affiliated Tribes v. Wold Engineering*, 476

in an interlocutory fashion, *Amici* do not know the events that transpired here. *Amici* do know this scenario is typical on their reservations.

U.S. 877 (1986)). Thus, piecemeal and duplicative litigation becomes inevitable unless the tribal court has civil subject-matter jurisdiction over the entire accident. Compare *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 819 (1976); *LaPlante*, 480 U.S. at 16 n.8 ("In Colorado River, as here, strong federal policy concerns favored resolution in the nonfederal forum"). In addition, the tribes' interest in providing forums on the reservation to efficiently adjudicate disputes is infringed if the only way this can be done is for tribal members to use state courts that otherwise would have no jurisdiction over them.

D. *Montana*, *Brendale* and *Bourland* Do Not Preclude Exercise of Tribal Civil Adjudicatory Jurisdiction in This Case.

The Eighth Circuit *en banc* majority in the present case found that this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. —, 124 L.Ed.2d 606 (1993), required an analysis of the *Montana* test to determine tribal court authority over civil cases involving non-Indian parties. 76 F.3d at 934-35. It was error for the Eighth Circuit to apply the standards of *Montana* and these other cases, which involve tribes' legislative regulation of non-Indians on fee lands that had been taken from tribes by Congress, to a case involving a tribe's civil adjudicatory authority.

Montana, *Brendale* and *Bourland* considered statutes where Congress had divested tribes of title to reservation land with the specific purpose of opening reservations to homesteaders or taking lands for flood control projects. The Court concluded in these cases that Congress also divested tribes of regulatory control over non-Indians on the taken lands, relying on congressional intent in those

statutes. E.g., *Montana*, 450 U.S. at 559-61; *Brendale*, 492 U.S. at 422-23 (opinion of Justice White), 435-37, 441-42, 446-47 (opinion of Justice Stevens); *Bourland*, 124 L.Ed.2d at 619-22. For example, in the allotment acts Congress promised and provided land to non-Indian settlers at the same time it broke up tribal lands in an effort to bring about the ultimate destruction of tribal governments. As the Court observed in *Montana*:

[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.⁷

450 U.S. at 560 n.9. Similarly, in *Bourland* the Court noted that Congress specifically intended for non-Indians to be able to hunt, fish and undertake other recreational activities on the lakes created by federal flood control projects on reservations. 124 L.Ed.2d at 619.

In contrast to the non-Indian activities tribes sought to regulate in *Montana*, *Brendale* and *Bourland*, Congress has

⁷ A leading scholar of federal Indian law has concluded:

Non-Indians often obtained Indian land through fraud or sharp dealing. Yet the fact remains that the United States invited its citizens to homestead Indian land and that non-Indians accordingly built homes and livelihoods within reservation boundaries. If many entered by means of illicit if not illegal transactions born of avarice, many others came simply in pursuit of honest dreams opened up by the homestead policy Doubtless there are cases where homesteaders were altogether oblivious of the fact that their new homes were within Indian reservations. These settlers came as families to open new land, not to do business with Indians.

C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 22-23 (Yale University Press 1987) (footnotes omitted).

never acted to take the tribal lands over which this highway was built or to divest tribes generally of authority to adjudicate civil cases with non-Indian parties, but has consistently strengthened and protected tribes' authority in this area, as shown in Part B, *supra*. Civil adjudicatory jurisdiction, moreover, is qualitatively different from the legislative regulation held precluded in *Montana*. A civil adjudication subjects the non-Indian defendant only "to the adjudicatory power of the tribunal," not the regulatory power of the tribe as in *Montana*, or the prosecutorial and penal power of the tribe as in *Oliphant*. Cf. *Duro*, 495 U.S. at 688. The court's role is comparatively passive, as a neutral arbiter, rather than active like a legislature, regulatory body or criminal prosecutor. See *Hartford Fire Ins. v. California*, — U.S. —, 125 L.Ed.2d 612, 650 (1993) ("[legislative jurisdiction] refers to the 'authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate'" (Scalia, J., dissenting) (citations omitted)).

The situations of the non-Indians in the present case are far different from the non-Indians in *Montana* or *Brendale* whose predecessors entered a reservation to purchase homestead lands at the invitation of the United States, assured by federal officials that the reservation would in time be extinguished, the tribal relations and jurisdiction dissolved and the tribal members assimilated. The non-Indian Petitioner is the widow and mother of tribal members who has lived on the reservation for several decades. The non-Indian Respondents entered the reservation to do business pursuant to a contract with the Tribes.

E. Applying the *Montana* Test, the Tribal Court Had Jurisdiction Over the Action.

If the Court finds that *Montana* applies here, the tribal court still had jurisdiction over this case under the two *Montana* exceptions. 450 U.S. at 565-66. The present

case exists only because the non-Indian Petitioner voluntarily filed her complaint in tribal court. Thus if "consensual relationships" are required for a tribal court to exercise jurisdiction over a civil case, see *Montana*, 450 U.S. at 565, this filing furnishes her consent. Indeed, since the tribal court would have jurisdiction over this case if the defendant were an Indian and would have jurisdiction over a suit by an Indian claiming to have been injured by Respondents, it may well be a violation of the Indian Civil Rights Act's equal protection provision, 25 U.S.C. § 1302 (8), for the tribal court to deny access to Petitioner in this case. See *Wold Engineering*, 476 U.S. at 888. Similarly, the non-Indian Respondents' entry onto the reservation to do business pursuant to a contract with the Tribes constitutes a consensual relationship with the Tribes. Furthermore, by driving an automobile on reservation roads the Respondents created circumstances in which they may foreseeably injure others, including Indians. It is clear that these activities of the non-Indian Respondents, in contrast to the non-Indians in *Montana*, *Brendale* and *Bourland*, did threaten the public health and safety and the political integrity of the Tribes.

CONCLUSION

This Court should decide that it is within the inherent tribal sovereignty of the Three Affiliated Tribes to confer jurisdiction on their tribal courts to resolve this tort case—because of the Court's established tradition of sustaining tribal court civil adjudicatory authority over cases involving non-Indians, because of Congress' assumptions about and treatment of civil adjudicatory jurisdiction and its specific actions supporting and strengthening tribal courts, and because neutral resolution of civil disputes is an essential attribute of sovereignty. This Court should reverse the Eighth Circuit and hold that the tribal courts have jurisdiction over this case.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1996

William STRATE, Associate Tribal Judge,
Tribal Court of the Three Affiliated Tribes
of the Fort Berthold Indian Reservation, *et al.*,

Petitioners,

v.

A-1 CONTRACTORS and Lyle Stockert,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Eighth Circuit

**BRIEF OF AMICI CURIAE SHAKOPEE
MDEWAKANTON SIOUX (DAKOTA) COMMUNITY,
SISSETON-WAHPETON SIOUX TRIBE, SPIRIT
LAKE SIOUX TRIBE AND RED LAKE BAND OF
CHIPPEWA IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

Page

INTEREST OF <i>AMICI CURIAE</i> SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMU- NITY, SISSETON-WAHPETON SIOUX TRIBE, SPIRIT LAKE SIOUX TRIBE AND RED LAKE BAND OF CHIPPEWA IN SUPPORT OF PETI- TIONERS	1
Shakopee Mdewakanton Sioux (Dakota) Commu- nity	1
Red Lake Band Of Chippewa	1
Sisseton-Wahpeton Sioux Tribe	2
Spirit Lake Sioux Tribe	3
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. IF THE COURT DETERMINES THAT STATE OF MONTANA V. UNITED STATES APPLIES TO THIS MATTER, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVA- TION RETAIN INHERENT POWER TO EXER- CISE CIVIL AUTHORITY OVER THE CONDUCT OF NONMEMBERS ON LANDS WITHIN THE RESERVATION BECAUSE THE CONDUCT AT ISSUE THREATENS OR HAS SOME DIRECT EFFECT ON THE HEALTH AND WELFARE AND POLITICAL INTEGRITY OF THE TRIBE	6
A. The Conduct Directly Affects Tribal Health And Welfare	8
B. The Conduct Directly Affects The Political Integrity Of The Tribe	9
1. Tribal Courts Are A Significant Compo- nent Of Tribal Sovereignty	10

TABLE OF CONTENTS - Continued

	Page
2. The Tribe's Authority Over Lands Within Its Reservation Is An Important Aspect Of Tribal Sovereignty	14
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>A-1 Contractors v. Strate</i> , 76 F.3d 930 (8th Cir. 1996)	<i>passim</i>
<i>Brendale v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989)	15
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	5, 6, 10, 17
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	13
<i>National Farmers Union Ins. Cos. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)	11, 13
<i>Seymour v. Superintendent of Washington State Peni- tentiary</i> , 368 U.S. 351 (1962)	9
<i>State of Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
<i>State of Washington v. Confederated Tribes of the Col- ville Indian Reservation</i> , 447 U.S. 134 (1980)	15
<i>Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.</i> , 476 U.S. 877 (1986)	13
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975) ...	6, 15, 17
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	6, 15-16, 17
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	5, 13
<i>Worcester v. The State of Georgia</i> , 6 Pet. 515, 8 L. Ed. 483 (1832)	5, 10, 16-17

FEDERAL STATUTES

American Indian Agricultural Resource Manage- ment Act, 25 U.S.C. § 3701, et seq.	11-12
---	-------

TABLE OF AUTHORITIES - Continued

	Page
Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. § 3401, et seq.....	11
Indian Financing Act of 1974, 25 U.S.C. § 1451, et seq.	11
Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.	11
Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, et seq.	11
Indian Tribal Justice Act, 25 U.S.C. § 3601, et seq.	11-13
Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001, et seq.	12
Native American Languages Act, 25 U.S.C. § 2901, et seq.	11
Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501, et seq.....	11
FEDERAL REGULATION	
25 C.F.R. Part 11	2
OTHER AUTHORITIES	
Random House Dictionary of the English Language (2d Unabridged Ed. 1987).....	8
Supreme Court Rule 37.2	1

INTEREST OF AMICI CURIAE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, SISSETON-WAHPETON SIOUX TRIBE, SPIRIT LAKE SIOUX TRIBE AND RED LAKE BAND OF CHIPPEWA IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, the above-listed American Indian tribes file this brief in support of the Petitioners. Letters of consent from counsel for all parties to the proceeding have been filed with the Clerk.

Shakopee Mdewakanton Sioux (Dakota) Community

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribe located near the Twin Cities in Minnesota. It was organized pursuant to the Indian Reorganization Act ("IRA") through a Constitution approved by the Secretary of the Interior in 1969.

The Community has had a tribal court since 1988. Its jurisdiction has been expanded on a number of occasions since its creation, and the tribal court now exercises general civil jurisdiction over matters arising on Community lands and involving Community members and other persons who come in contact with the Community. Because the Community is located very near an urban area, and because it operates a casino with a high volume of non-member visitors, the Eighth Circuit decision in this case hinders the Community's ability to control and determine what conduct is acceptable within its territory.

Red Lake Band of Chippewa

The Red Lake Band of Chippewa Indians is a federally recognized Indian tribe located in north central

Minnesota with a tribal population of over 8,000 members. The Red Lake Band is not organized under the IRA, and operates under a Constitution enacted by the Band and approved by the Secretary of the Interior in 1958.

The Band has had a tribal court since 1884, although the court was a "C.F.R." court subject to federal regulations until 1988. The Band's current tribal court was established by, and is wholly governed by, tribal law, without regard to the federal regulations in 25 C.F.R. Part 11. The Band has an extensive tribal code which governs matters including such diverse areas as criminal jurisdiction, probate, commitment, motor vehicle registration and highway traffic regulation. The Eighth Circuit's decision in this case seriously undermines the ability of the Band's tribal court to enforce the Band's laws regulating the conduct of all persons within its reservation boundaries.

Sisseton-Wahpeton Sioux Tribe

The Sisseton-Wahpeton Sioux Tribe is a federally recognized Indian tribe located in northeastern South Dakota and southeastern North Dakota, with a tribal population of over 10,000 members. The Tribe is situated on the Lake Traverse Reservation, as established by the treaty of February 19, 1867.

The Tribe created its tribal court in 1968, and has expanded and refined the court's jurisdiction throughout the years. Under the Tribe's statutory and case law, however, it has civil jurisdiction over its territory, its members, and those who enter its territory. The Eighth Circuit's decision in this case jeopardizes the Tribe's

ability to govern within the Tribe's reservation boundaries by adjudicating disputes arising there, including those that involve nonmembers of the Tribe.

Spirit Lake Sioux Tribe

The Spirit Lake Sioux Tribe (formerly known as the Devil's Lake Sioux Tribe) is a federally recognized tribe located in north central North Dakota. The Tribe operates under a Constitution enacted by the Tribe in 1944 and approved by the Secretary of the Interior in 1946.

The Tribe has a longstanding tribal court that exercises general civil jurisdiction. It was created to settle disputes arising on the Tribe's reservation. The Eighth Circuit's decision in this case interferes with the Tribe's legitimate exercise of its jurisdiction to adjudicate disputes arising on its reservation, all of which affect its health and welfare, and its political integrity.

SUMMARY OF ARGUMENT

Amici agree with Petitioners here that this Court's decision in *State of Montana v. United States*, 450 U.S. 544 (1981), does not apply to the present matter. If this Court determines, however, that *Montana* does apply to this matter, the Court should find that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribal Court") has civil jurisdiction over the underlying dispute here because the conduct at issue falls within the exceptions to the general rule in *Montana*. *Montana*, 450 U.S. at 565-66.

In *Montana*, this Court held that a tribe retains its civil authority over the conduct of non-Indians on the lands within its reservation when "that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe." *Id.* The conduct at issue here – tortious driving on the Fort Berthold Indian Reservation (the "Reservation") – has a direct effect on the health and welfare of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (the "Tribe") and the political integrity of the Tribe.

Unsafe conduct such as negligent driving has the potential to damage property on the Reservation or cause injury or death to people on the Reservation. Such hazardous activity threatens and has a direct effect on the health and welfare of the Tribe. The Tribal Court's ability to adjudicate claims arising out of dangerous conduct on the Reservation should not depend on whether the individual harmed by the conduct is a tribal member. Moreover, in the present case, the victim of the accident is the mother of tribal members. *A-1 Contractors v. Strate*, 76 F.3d 930, 932 (8th Cir. 1996).

The conduct at issue here is also within the *Montana* exceptions because it threatens or has a direct effect on the political integrity of the Tribe. *See Montana*, 450 U.S. at 565-66. If the Tribal Court, an arm of the Tribe's sovereign government, cannot adjudicate matters involving common law tortious conduct within the boundaries of the Reservation, the Tribal Court's power and authority are considerably weakened.

The conduct at issue here also threatens the Tribe's legislative authority, and hence the political integrity of

the Tribe. The Tribe has adopted a tribal code which outlines the civil jurisdiction of the Tribal Court and provides that tribal law and custom is controlling precedent for torts occurring on the Reservation. *A-1 Contractors*, 76 F.3d at 943 (Beam, J., dissenting). If the conduct at issue here is allowed to continue in the absence of Tribal Court jurisdiction, the legislative authority and political integrity of the Tribe will be impaired.

Tribal courts are a significant component of tribal sovereignty. This Court has long recognized the federal government's policy of encouraging tribal self-government. *See, e.g., Worcester v. The State of Georgia*, 6 Pet. 515, 537, 8 L. Ed. 483 (1832). This Court has held that "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). This Court has also recognized that if "the authority of the tribal courts over Reservation affairs" is undermined, tribal self-government is infringed upon. *Williams v. Lee*, 358 U.S. 217, 223 (1959). The Eighth Circuit's decision here diminished the authority of the Tribal Court and therefore threatened the political integrity of the Tribe.

The Tribe's authority over lands within the Reservation is another important aspect of tribal sovereignty. Tribes, although not full sovereigns, remain vested with some inherent sovereign powers. The Eighth Circuit concluded, without supporting analysis, that authority over the tortious conduct of nonmembers on the Reservation was among the attributes of sovereignty lost by the Tribe pursuant to the Tribe's dependent status. In so concluding, the Eighth Circuit ignored the fact that the civil

authority of tribes over the territory within their reservations has historically been an integral aspect of tribal sovereignty. *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 142 (1980). "Tribal authority over the activities of non-Indians on reservation lands" continues to be an "important part of tribal sovereignty." *LaPlante*, 480 U.S. at 18.

The Eighth Circuit's determination that the conduct at issue here does not threaten or directly affect the health, welfare or political integrity of the Tribe was erroneous and should be reversed.

ARGUMENT

I. IF THE COURT DETERMINES THAT *STATE OF MONTANA V. UNITED STATES* APPLIES TO THIS MATTER, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION RETAIN INHERENT POWER TO EXERCISE CIVIL AUTHORITY OVER THE CONDUCT OF NON-MEMBERS ON LANDS WITHIN THE RESERVATION BECAUSE THE CONDUCT AT ISSUE THREATENS OR HAS SOME DIRECT EFFECT ON THE HEALTH AND WELFARE AND POLITICAL INTEGRITY OF THE TRIBE

The United States Court of Appeals for the Eighth Circuit determined that this Court's decision in *State of Montana v. United States*, 450 U.S. 544 (1981), controls here and that because the underlying action was a simple automobile negligence matter involving two individuals who were not members of the Tribe, the exceptions described in *Montana*, 450 U.S. at 565-566, do not apply.

Amici agree with Petitioners here that this Court's decision in *Montana* is inapplicable to this matter. However, if this Court determines that *Montana* provides the rule of law here, the Court should reverse the judgment of the Eighth Circuit and hold that the Tribal Court has jurisdiction over the underlying dispute, because the conduct at issue falls within the *Montana* exceptions.

In *Montana*, this Court determined that the Crow Tribe of Montana did not possess inherent tribal authority to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians, but recognized that,

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 566. The underlying issue in this case is whether a driver operated his motor vehicle tortiously while traveling on the Reservation. Despite the fact that this matter involves dangerous conduct within the boundaries of the Reservation, the Eighth Circuit held that "this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and customs. It deals only with the conduct of non-Indians and the tribe's asserted ability to exercise plenary judicial authority over a decidedly non-tribal matter." *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996). The Eighth Circuit's view of what constitutes a tribal matter is unduly narrow and works an injury on the sovereignty of the Tribe.

A. The Conduct Directly Affects Tribal Health And Welfare

The "conduct" at issue here is the allegedly tortious driving of one of the respondents. Unsafe conduct of this sort has the potential to damage property or injure or kill people on the Reservation, whether those people are tribal members, nonmember residents, or visitors to the Reservation. Hazardous activity that is conducted on the Reservation implicates the tribal government's interest in the "health or welfare of the tribe." *Montana*, 450 U.S. at 566.

The Eighth Circuit's decision establishes a rule whereby a nonmember driving negligently on the Reservation who hits and injures a tribal member is subject to Tribal Court jurisdiction, but a nonmember driving negligently on the Reservation who hits and injures a nonmember escapes the jurisdiction of the Tribal Court. The conduct at issue – negligent driving – is the same in each case, yet the Tribal Court's authority to address the conduct is determined by the status of the victim. The Eighth Circuit's interpretation of this Court's use of the word "conduct" in the *Montana* decision is improperly narrow and does not comport with the definition of the word in normal usage. "Conduct" is defined as "personal behavior; way of acting; bearing or deportment." The Random House Dictionary of the English Language 426 (2d Unabridged Ed. 1987). The behavior at issue in this matter is hazardous and therefore affects the health and welfare of the Tribe. The Tribal Court's ability to adjudicate claims

arising out of dangerous conduct on the Reservation should not be dependent on the identity of the victim.¹

Additionally, in the present case, it defies logic to suggest that there is no effect on the welfare of the Tribe when the victim of the car accident here is the mother of tribal members. See *A-1 Contractors*, 76 F.3d at 932. The Eighth Circuit's decision establishes an arbitrary construct with respect to what constitutes a "tribal interest" under *Montana*.

B. The Conduct Directly Affects The Political Integrity Of The Tribe

The conduct at issue here also directly affects the political integrity of the Tribe. Conduct with the potential to harm, such as tortious driving, is of concern to all governmental entities. Additionally, every government has an interest in maintaining free and safe access to the public roads passing through its territory. If the Tribal Court cannot adjudicate matters involving common law tortious conduct within the boundaries of the Reservation, the Tribal Court's power and authority are considerably weakened. This evisceration of Tribal Court jurisdiction is a threat to the political integrity of the Tribe.

¹ This Court has recognized that "checkerboard jurisdiction" based on the ownership of land within reservation boundaries is impractical. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962). The same can be said for the checkerboard jurisdiction based on the status of the victim of tortious conduct that results from the Eighth Circuit's decision.

The conduct at issue here is also a threat to the political integrity of the Tribe because the Tribe has adopted a tribal code which establishes civil Tribal Court jurisdiction within the exterior boundaries of the Reservation. This tribal code provides that tribal law and custom is controlling precedent for torts occurring within the boundaries of the Reservation. *See A-1 Contractors*, 76 F.3d at 943 (Beam, J., dissenting). If the underlying conduct at issue in this matter is allowed to continue on the Reservation with impunity in the absence of Tribal Court jurisdiction, the Tribe's political integrity will be impaired because the legislative mandate of the Tribe establishing the jurisdiction of the Tribal Court will be rendered a nullity.

1. Tribal Courts Are A Significant Component Of Tribal Sovereignty

Since as early as 1819, the federal government has sought to preserve the Indian nations. *See Worcester v. The State of Georgia*, 6 Pet. 515, 557, 8 L. Ed. 483 (1832) (discussing 1819 federal legislation enacted "for the purpose of providing against the further decline and final extinction of the Indian tribes . . ."). This Court has repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government. In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987), this Court noted that "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." (Citation omitted.) The Eighth Circuit declined to apply the *LaPlante* decision here because that case "only established an exhaustion

rule." *A-1 Contractors*, 76 F.3d at 936. The Eighth Circuit similarly discounted the relevance of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), by deeming it merely "an exhaustion case." *A-1 Contractors*, 76 F.3d at 936. By dismissing in a wholesale manner the relevance of these decisions to the matter at hand, the Eighth Circuit neglected the wealth of learning on the federal policy favoring tribal self-determination and self-government underlying those decisions.

Congress has repeatedly reaffirmed this strong federal policy.² In 1993 Congress passed the Indian Tribal

² *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. § 3601, et seq.; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, et seq. (committing the United States to supporting and assisting Indian tribes in "the development of strong and stable tribal governments"); Indian Financing Act of 1974, 25 U.S.C. § 1451, et seq. (declaring the policy of Congress to help develop and utilize Indian resources "to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources"); Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501, et seq. (committing the federal government to "the establishment of a meaningful Indian self-determination policy for education"); Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. (declaring that a principal goal of federal Indian policy is "to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); Native American Languages Act, 25 U.S.C. § 2901, et seq. (recognizing "the United States policy of self-determination for Native Americans"); Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. § 3401, et seq. (advocating the provision of employment, training and related services by Indian tribal governments in order "to serve tribally-determined goals consistent with the policy of self-determination"); American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701, et seq. (promoting

Justice Act, 25 U.S.C. § 3601, et seq., dedicated to furthering and strengthening tribal courts. In enacting this statute, Congress found, in part, that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments" 25 U.S.C. § 3601(5).³ This Congressional finding confirms

"the self-determination of Indian tribes by providing for the management of Indian agricultural lands and related renewable resources"); Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001, et seq. (promoting tribal management of tribal funds in order to "demonstrate how the principles of self-determination can work with respect to the management of such trust funds").

³ The full Congressional findings made in the Indian Tribal Justice Act demonstrate the strength of the federal policy favoring tribal self-government: "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; [and] (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes" 25 U.S.C. § 3601.

The Eighth Circuit decision here undermines many of these Congressional purposes. For example, by permitting

that the vitality of tribal courts is integral to both the health and welfare of tribes and to tribes' political integrity – precisely the tribal interests that this Court has recognized as justifying exceptions from the *Montana* rule. *Montana*, 450 U.S. at 565-66.

This Court has acknowledged that "[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.*, 471 U.S. at 856. See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n. 5 (1982); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986) (referring to "Congress' jealous regard for Indian self-governance"). In deciding whether state court jurisdiction was available to a non-Indian who had sued a tribal member, this Court stated that to "undermine the authority of the tribal courts over Reservation affairs . . . would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959). Although the issue presented in *Williams* was not identical to that here, the underlying principle remains the same – any reduction of the Tribal Court's authority over claims arising on the

nonmembers to engage in tortious conduct on the Reservation, the Eighth Circuit decision fails to protect the Tribe's sovereignty. The effect of the Eighth Circuit decision will impede the Tribe's ability to establish its own justice system and to define the jurisdiction of, and applicable precedent to be used in, that justice system. Finally, as discussed above, by permitting negligent drivers to travel the Reservation with impunity, the decision impedes the Tribal Court from ensuring the health, safety and political integrity of the Tribe.

Reservation that is worked by an outside entity weakens the Tribal Court and impinges on the Tribe's sovereignty.

It is well-established by Congressional action and this Court's decisions that maintaining the integrity of Tribal Courts is an important component of furthering the federal policy of supporting tribal self-government. The Eighth Circuit decision, which constrains the jurisdiction of the Tribal Court granted by the Tribe and allows non-members to engage in tortious activity on the Reservation outside the reach of the Tribal Court, is at odds with this important federal policy.

2. The Tribe's Authority Over Lands Within Its Reservation Is An Important Aspect Of Tribal Sovereignty

The Eighth Circuit determined that the matter at issue here did not have a direct effect on the political integrity of the Tribe because tribes are "limited sovereigns," and therefore cannot exercise the rights of "full sovereign[s]." *A-1 Contractors*, 76 F.3d at 940. The Eighth Circuit concluded, without analysis, that the Tribal Court's authority over tortious conduct of nonmembers on the Reservation was among the facets of sovereignty curtailed when the Tribe acquiesced to the authority of the United States. A decision such as this one, which has a direct effect on the political integrity of the Tribe by diminishing an important tribal institution, the Tribal Court, warranted more than the cursory consideration allotted by the Eighth Circuit.

Although it is true that this Court's precedents hold that the sovereignty of the Tribe, like that of all Indian

tribes, was necessarily diminished as a result of the Tribe's dependent status on the United States, "tribal civil jurisdiction over non-Indians on reservation lands is not an aspect of tribal sovereignty necessarily divested by reason of the tribes' incorporation within the dominant society." *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 454 (1989) (Blackmun, J., concurring and dissenting).

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

State of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980) (holding that tribes have the authority to tax non-Indians purchasing cigarettes on the reservation).

The civil authority of tribes over the territory within their reservations has historically been an integral aspect of tribal sovereignty. This Court has long recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added)⁴; see also *White Mountain Apache Tribe*

⁴ The *Mazurie* case addressed the issue of a tribe's authority to regulate conduct presenting potential public health and

v. Bracker, 448 U.S. 136, 142 (1980). This Court's pronouncements on this issue go back to 1832, when Chief Justice Marshall stated that,

From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Worcester, 6 Pet. at 556-57.

The issue in *Worcester* was whether the state of Georgia had the power to enact laws rendering tribal self-government illegal and otherwise impinging on the authority of the Cherokee Tribe over its own reservation. In determining that Georgia lacked the power to so intrude on the jurisdiction of the Cherokees, the Court made a close examination of the nature of the Cherokees' sovereign status, recognizing that,

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the

safety hazards – the sale of alcohol on the reservation. Like the conduct at issue in the present case, the sale of liquor is the type of commonplace activity regularly and commonly addressed by governments.

undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed

Id. at 559. The Court held that "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force" *Id.* at 561. The outer boundaries of a given tribe's reservation have served to define the tribe's principal jurisdiction, with the interior of the reservation as its governed territory.

This Court's attention to the geographical aspect of tribal political integrity has not waned with the passing of time. While acknowledging that the reservation boundary is not always congruent with tribal sovereign powers, the Court, noting the history of its jurisprudence on this matter, has observed that, "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *White Mountain Apache Tribe*, 448 U.S. at 151, quoting *Mazurie*, 419 U.S. at 558. In the context of tribal court jurisdiction the Court has held that, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty or federal statute." *LaPlante*, 480 U.S. at 18. Congress has passed no statute restricting the jurisdiction of the Tribal Court here.

The Eighth Circuit improperly determined first, that *Montana* applies to this case and second, that the conduct

at issue in the underlying action here does not threaten or directly affect the political integrity of the Tribe. This Court's precedents and Congressional enactments affirming the federal policy favoring tribal self-government and self-determination demonstrate that the conduct at issue here threatens and directly affects the health, welfare and political integrity of the Tribe.

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the Eighth Circuit's en banc decision and affirm the Eighth Circuit panel decision. If the Court determines that the rule in *Montana* applies to this matter, the Court should reverse the Eighth Circuit's en banc decision and affirm the Eighth Circuit panel decision on the grounds that the conduct at issue in the underlying action threatens and directly affects the health and welfare of the Tribe and the political integrity of the Tribe.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE,
TRIBAL COURT OF THE THREE
AFFILIATED TRIBES OF THE FORT BERTHOLD
INDIAN RESERVATION, ET AL.,

Petitioners,

v.

A-1 CONTRACTORS AND LYLE STOCKERT,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE FOR
STATES OF MONTANA, ARIZONA, CALIFORNIA,
COLORADO, IDAHO, MASSACHUSETTS,
MISSISSIPPI, NEVADA, NEW YORK, SOUTH
DAKOTA, UTAH, WASHINGTON, WISCONSIN
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40 pp

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a nonmember plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state highway within the reservation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI STATES.....	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	7
I. THIS COURT HAS CONSISTENTLY RECOGNIZED THAT THE DEPENDENT SOVEREIGN STATUS OF INDIAN TRIBES CARRIES WITH IT A GENERAL DIVESTITURE OF AUTHORITY OVER NONMEMBERS AND THAT TRIBAL TERRITORIAL AUTHORITY IS OF A UNIQUE AND LIMITED NATURE	7
II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT TRIBAL CIVIL ADJUDICATORY AUTHORITY MUST BE DETERMINED BY REFERENCE TO THE SAME PRINCIPLES WHICH GOVERN TRIBAL CIVIL REGULATORY JURISDICTION.....	11
A. The Petitioners Incorrectly Portray <i>Williams v. Lee</i> , <i>National Farmers Union</i> and <i>Iowa Mutual</i> as Addressing the Merits of the Tribal Adjudicatory Jurisdiction Issues....	12
B. The Fact That the Tribes May Retain a Servient or Reversionary Interest in the Subject Highway Right-of-Way Does Not Render It "Indian Land" for Jurisdictional Purposes.....	15

TABLE OF CONTENTS - Continued

	Page
C. Amici's Contention That a Sovereign's Adjudicatory Authority May Exceed Its Legislative Authority Is Incorrect.....	17
III. THE RESPONDENTS DID NOT CONSENT TO TRIBAL COURT JURISDICTION, AND THE SECOND MONTANA EXCEPTION DOES NOT OTHERWISE PROVIDE A BASIS FOR DIRECT TRIBAL AUTHORITY.....	22
A. <i>Montana's</i> Consent Exception Should Not Be Construed So Broadly as to Swallow the General Rule	22
B. The Second <i>Montana</i> Exception Does Not Provide a Basis for Direct Tribal Authority Over Nonconsenting Nonmembers	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1990).....	7
BMW, Inc. v. Gore, 116 S. Ct. 1589 (1996).....	17
Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989)....	<i>Passim</i>
Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989).....	29
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).....	18
Duro v. Reina, 495 U.S. 676 (1990).....	4, 9, 10
Fisher v. District Court, 424 U.S. 382 (1976).....	14
Fletcher v. Peck, 10 U.S. 87 (1810).....	8
Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).....	<i>Passim</i>
Lewis County, Idaho v. Allen, No. 94-35979 (9th Cir., appeal docketed Oct. 11, 1995).....	2
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).....	<i>Passim</i>
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).....	10
Montana v. Gilham, 932 F. Supp. 1215 (D. Mont. 1996) <i>appeal docketed</i> , No. 96-35766 (9th Cir. July 18, 1996).....	<i>Passim</i>
Montana v. Sollars, No. CV-96-010-GF-PGH (D. Mont., filed Apr. 14, 1995).....	2

TABLE OF AUTHORITIES - Continued

Page

Montana v. United States, 450 U.S. 544 (1989)...	<i>Passim</i>
National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).....	11, 12, 13, 14
Nevada v. Hicks, No. CV-N-94-351-DWH, 1996 WL 600865 (D. Nev. Sept. 30, 1996).....	2
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).....	13
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).....	10
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).....	17
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)...	4, 7
South Dakota v. Bourland, 508 U.S. 679 (1993) ..	<i>Passim</i>
Swift Transportation, Inc. v. John, 546 F. Supp. 1185 (D. Ariz. 1982), <i>vacated on mootness grounds</i> , 574 F. Supp. 710 (D. Ariz. 1983).....	16
Tafflin v. Levitt, 493 U.S. 455 (1990).....	19
Talton v. Mayes, 163 U.S. 376 (1896).....	7
United States v. Mazurie, 419 U.S. 544 (1975).....	9, 15
United States v. Plainbull, 959 F.2d 724 (9th Cir. 1992).....	21
United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996).....	21
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).....	13, 14
Williams v. Lee, 358 U.S. 217 (1957).....	12, 13, 14

TABLE OF AUTHORITIES - Continued

Page

Worcester v. Georgia, 31 U.S. 515 (1832).....	8, 9, 10
Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996).....	2, 11

FEDERAL MATERIALS

United States Constitution

Amend. X	19
Amend. XI	3
Amend. XIV.....	19
Art. IV, § 1.....	19
Art. IV, § 2.....	19

United States Code

Tit. 8, § 1401(b).....	10
Tit. 25, §§ 323-328	16
Tit. 25, § 324	16
Tit. 25, § 325	16
Tit. 28, § 1331	14
Tit. 28, § 1332	5, 14

Statutes at Large

24 Stat. 388.....	9
43 Stat. 253.....	10
62 Stat. 17.....	16

TABLE OF AUTHORITIES - Continued

Page

Supreme Court Rules

§ 37.2	1
--------------	---

OTHER AUTHORITIES

Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population: General Population Characteristics: American Indian and Alaska Native Areas (CP-1-1a) (Nov. 1992)	1
Furber, Bradley B., <i>Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War</i> , 14 U. Puget Sound L. Rev. 211 (1991).....	29
Gould, L. Scott, <i>The Consent Paradigm: Tribal Sovereignty at the Millennium</i> , 96 Colum. L. Rev. 809 (1996)	11, 29
Prucha, Francis Paul, <i>The Great Father</i> (1984)	9, 10
Restatement (Third) of Foreign Relations Law of the United States § 431 (1987)	18
Restatement (Second) of Judgments § 11 (1980).....	18
Story, Joseph, <i>Commentaries on the Conflict of Laws</i> § 2a (1865)	8
Wharton, Francis, <i>A Treatise on the Conflict of Laws</i> § 1a (Parmele ed. 1905).....	18

The amici curiae States, through their respective Attorneys General, respectfully submit a brief pursuant to S. Ct. R. 37.2 in support of Respondents.

INTEREST OF THE AMICI STATES

Each State appearing as amicus curiae has within or adjacent to its borders one or more Indian reservations. These reservations were initially created as areas where the affected tribe's members would have exclusive occupancy rights. In many instances subsequent federal laws and policies eliminated that territorial exclusivity. It is thus now quite common that many of the residents of Indian reservations are not members of the involved tribe and that a significant proportion of the land is held by nonmembers.¹ Moreover, the same federal laws and policies which resulted in the introduction of nonmembers onto Indian reservations also resulted in state governments extending their services to many reservation areas and citizens, and to the formation of local governmental entities under state law. The complex land ownership and demographic patterns now characterizing many Indian reservations thus raise difficult questions whenever, as here, the involved tribe seeks to extend its governmental powers to persons and entities who are not part of its political community. Confusion over the principles which

¹ In 1990, of the total of 808,163 people residing on Indian reservations only 437,431 were Indians. Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population: General Population Characteristics: American Indian and Alaska Native Areas* (CP-1-1a) (Nov. 1992).

provide the answer to that question creates substantial uncertainty in the conduct of economic and governmental affairs on Indian reservations. The amici States thus have a general interest in the development of coherent, analytically sound rules governing the scope of tribal jurisdiction.

The amici States also have a specific interest in how this case is resolved since many of them, their political subdivisions, or their officers are being sued with increasing regularity in tribal courts.² Apart from defenses they may raise in those actions that are unique to their sovereign status,³ a decision in this case addressing the nature and scope of tribal court jurisdiction may directly affect the amici States' ability to defend their governmental and proprietary interests in existing and future cases. Petitioners' argument that the involved highway right-of-way granted to the State of North Dakota should be

² See, e.g., *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (tribal court lacked jurisdiction to invalidate state property tax on Indian-owned fee land); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996) (tort action against state in tribal court arising from auto accident on federally-granted right-of-way), *appeal docketed*, No. 96-35766 (9th Cir. July 18, 1996); *Montana v. Sollars*, No. CV-96-010-GF-PGH (D. Mont., filed Apr. 14, 1995) (tort action against state in tribal court arising from auto accident on federally-granted right-of-way); *Lewis County, Idaho v. Allen*, No. 94-35979 (9th Cir., *appeal docketed* Oct. 11, 1994) (appeal involving civil rights action in tribal court against county and county sheriff); *Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 WL 600865 (D. Nev. Sept. 30, 1996) (claims by tribal member against state game wardens arising from on-reservation search and seizure).

³ See *Gilham*, 932 F. Supp. at 1219-23 (state immune from tort action in tribal court).

treated as "Indian land" for jurisdictional purposes is thus of immediate concern to the amici States because most hold federally-granted highway rights-of-way through Indian reservations and engage on those rights-of-way in sovereign functions carrying substantial risk of suit.

But beyond immediate concerns over tort liability for highway-related matters is the potential of tribal court litigation and coercive relief to regulate the discharge of the States' more general governmental responsibilities on Indian reservations. Since tribes and their courts are not subject to the constitutional restraints, such as the Tenth and Eleventh Amendments, which operate as a check on federal power vis-à-vis the States, accepting the broad "territorial" view of tribal court power advanced by Petitioners and their amici may threaten to radically reshape traditional notions of state sovereignty. These concerns are heightened by the possible unavailability of federal court review with respect to the merits of claims decided by tribal courts. The ramifications of the decision here to the amici States are therefore very significant.

SUMMARY OF THE ARGUMENT

The question whether the court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has jurisdiction to adjudicate a tort suit brought by a non-member plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state-owned right-of-way on the Reservation requires an analysis of three related questions. The first involves an

examination of the general principles guiding the Court's conception of tribal sovereignty. The second focuses on whether there is any basis to Petitioners' claim that there are different rules for determining the existence of tribal authority in regulatory and adjudicatory contexts. The third, and perhaps most important, is whether there is any basis to conclude that the Tribes possess inherent or other authority over the instant matter.

1. This Court's Indian law jurisprudence has consistently recognized the unique nature of tribal sovereignty, and has often focused on reconciling two fundamental – and competing – principles. The first is that tribal powers of self-government are neither based in nor constrained by the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The second is that Indian tribes, due in large part to acts of Congress, no longer possess the type of territorial hegemony they once did. *Montana v. United States*, 450 U.S. 544 (1989). Because political consent lies at the core of governance under the Constitution (e.g., *Duro v. Reina*, 495 U.S. 676 (1990)), the Court has held that “the exercise of tribal self-government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.” *Montana*, 450 U.S. at 564. Conspicuously missing from this Court's decisions is the view proposed by Petitioners that tribal sovereign powers are “territorial” in the same sense that state or federal sovereign powers are.

2. The court of appeals correctly concluded that the scope of tribal adjudicatory power is to be determined by reference to *Montana* and its progeny and that decisions

of this Court dealing with tribal adjudicatory matters, most importantly *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), do not establish a different rule. In *Montana and Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court spoke generally to the scope of tribal authority over nonmembers, limiting neither its discussion nor its rationale to regulatory issues arising on fee lands. *Iowa Mutual* dealt with whether diversity jurisdiction under 28 U.S.C. § 1332 should be exercised over a claim by an insurance carrier against a tribal member growing out of a reservation-based accident and an existing tribal court proceeding. In concluding that such jurisdiction should not be exercised, the Court said nothing about the jurisdiction of tribal courts over nonconsenting nonmember defendants.

Petitioners' related argument that the involved right-of-way remains “Indian land” for jurisdictional purposes is inconsistent with the principle reaffirmed most recently in *South Dakota v. Bourland*, 508 U.S. 679 (1993), that an Indian tribe's regulatory power over nonmembers is primarily a function of its right to condition access to or continued use of tribal lands. Since the granting of the right-of-way easement by the federal government to the State of North Dakota divested the Three Affiliated Tribes of any power to exclude nonmembers from those lands, it necessarily divested them of any lesser-included regulatory powers.

The broad assertion made by Petitioners' amici that a sovereign's adjudicatory authority may exceed its regulatory authority suffers from three main flaws. First, as the court of appeals correctly observed, in deciding a case a court effectively regulates conduct. That principle applies

whether it is the forum's law or another sovereign's law that is being applied. Second, tribal sovereignty is sufficiently dissimilar to that of state or federal sovereignty to make generalizations from one to the other inappropriate. Third, a sovereign's judiciary is no more than an instrument by which it exercises preexisting authority to affect the involved legal interests. It is thus necessary to inquire in the first instance whether the sovereign has the power to affect the involved legal interests. If it does not, a fortiori its courts do not.

3. The court of appeals correctly concluded that neither "exception" discussed in *Montana* provides a basis for tribal court jurisdiction. The first, or consent, exception has not been satisfied because the Three Affiliated Tribes lacked the power to exclude Respondents from the state highway where the accident occurred. Petitioners' argument that consent should be presumed from the fact that respondent A-1 Contractors had a business relationship with the Tribes overlooks the fact that it and its employees possessed the right to be on the state highway independent of that business relationship. No tribal court jurisdiction exists under the second *Montana* exception since it does not serve as a basis for direct tribal authority over nonconsenting nonmembers.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY RECOGNIZED THAT THE DEPENDENT SOVEREIGN STATUS OF INDIAN TRIBES CARRIES WITH IT A GENERAL DIVESTITURE OF AUTHORITY OVER NONMEMBERS AND THAT TRIBAL TERRITORIAL AUTHORITY IS OF A UNIQUE AND LIMITED NATURE.

Indian tribes, while possessing incidents of sovereignty, are not comparable to States or local governments but instead possess unique legal characteristics identified early in this Nation's jurisprudence. Among those unique characteristics is the extent of tribal authority with respect to nonmembers who live on, conduct business within, or pass through reservations. The scope of that authority, in turn, must be measured against this Court's quite consistent view of the nature of tribal sovereignty – a view which runs largely if not entirely counter to the notion that tribes possess a form of "territorial" governmental jurisdiction comparable to that of States. Two basic threads of this Court's Indian law jurisprudence explain why.

The first of those threads is that Indian tribes possess powers of internal self-government that are neither based in nor constrained by the Constitution. See, e.g., *Santa Clara Pueblo*, 436 U.S. at 57; *Talton v. Mayes*, 163 U.S. 376 (1896). Indian tribes' inherent powers of self-government are of a kind "unknown to any other sovereignty in the Nation" (*Brendale*, 492 U.S. at 433 (Stevens, J., concurring in part and dissenting in part)), a fact that reflects they are not party to the federal Union. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1990). Thus, where

extant, Indian tribes' inherent powers of self-government allow them to govern in ways that would "be intolerable in a non-Indian community." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); *Santa Clara Pueblo*, 436 U.S. at 56.

The second thread recognizes that Indian tribes are no longer independent nations and have been incorporated into our Nation's social and political fabric. Of necessity, however, this incorporation involved the divestiture of Indian tribes' preexisting sovereign powers to determine independently their relations with persons who are not part of their self-governing political community. If, as Chief Justice Marshall observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832), under the "settled doctrine of the law of nations . . . a weaker power does not surrender its independence - its right of self-government, by associating with a stronger, and taking its protection," the correlative principle is also true: that such retained self-government rights empower the weaker power to do no more than to "maintain [its] own laws and usages and customs over [its] own race, [and to] regulate [its] own private rights and affairs according to [its] own municipal jurisprudence." Joseph Story, *Commentaries on the Conflict of Laws* § 2a (1865). This correlative principle is reflected in Justice Johnson's oft-quoted statement in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 145 (1810), that "[a]ll the restrictions upon the right of soil in the Indians[] amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

The Court's modern decisions have carried forward this view of inherent tribal sovereignty. See *Bourland*, 508 U.S. at 694-95 ("[a]lthough Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to control internal tribal relations, . . . the 'exercise of tribal self-government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation' "). Thus, as reiterated most recently in *Bourland*, Indian tribes' sovereign powers are grounded in notions of self-government (e.g., *Duro*, 495 U.S. at 684-86) or federal delegation (e.g., *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975)).

Conspicuously missing from this formulation of inherent tribal authority are notions of "territorial" sovereignty - i.e., sovereignty defined by territorial rather than intratribal political reach. Such notions at the time of Chief Justice Marshall's seminal opinions were largely immaterial because national policy and "[t]he actual state of things" (*Worcester*, 31 U.S. (6 Pet.) at 560) reflected the fact that tribes and their members largely were segregated from non-Indians in areas set aside for their exclusive use and occupancy. See generally Francis Paul Prucha, *The Great Father* 89-98, 179-81 (1984). Territorial and intratribal political governance were accordingly coextensive. That identity was fractured by passage of the General Allotment Act (Act of Feb. 8, 1887, 24 Stat. 388) and subsequent legislation seeking to assimilate tribal members into non-Indian economic and social cultures

through fee patents to Indians and by opening reservations to settlement by non-Indians. *Prucha, supra* at 666-71, 864-85. "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*" (*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)) with respect to the existence of state authority in Indian country simultaneously broke down as non-Indian settlers brought with them not only their culture but also their government and, culminating with the Act of June 24, 1924, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)), as Indians themselves assumed citizenship. *Prucha, supra* at 681-86, 793-94, 895-96. That "conceptual clarity" likewise broke down with respect to claims of tribal "territorial" sovereignty. *Montana*, 450 U.S. at 559, n.9; *see also Duro*, 495 U.S. at 685 ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory. . . . *Oliphant [v. Suquamish Indian Tribe]*, 435 U.S. 191 (1978)) recognized that the tribes can no longer be described as sovereigns in this sense").

The amici States do not suggest, of course, that the scope of tribal sovereignty is wholly divorced from territorial considerations. *See Merrion*, 455 U.S. at 142 ("[w]e do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). It is nevertheless perhaps inaccurate to describe the exercise of tribal authority based on the control of territory and the concomitant right to exclude as giving rise to "inherent" authority over nonmembers. In such a situation, that authority depends as a usual matter upon the regulated party's consensual determination to enter an area under tribal

ownership as to which the tribe has conditioned initial or continued access upon acceptance of general or specific forms of tribal civil regulation. However, regardless of whether authority exercised under those circumstances properly is characterized as "inherent," no real dispute exists that notions of purely "territorial" jurisdiction have a limited role in determining whether tribes have authority to adjust the legal responsibilities of nonmembers and, in practical terms, relate to the consent prong of those exceptions. *See generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809 (1996). It is against this backdrop that the issues here must be decided.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT TRIBAL CIVIL ADJUDICATORY AUTHORITY MUST BE DETERMINED BY REFERENCE TO THE SAME PRINCIPLES WHICH GOVERN TRIBAL CIVIL REGULATORY JURISDICTION.

As the court of appeals correctly concluded, the limitations on Indian tribes' governmental powers over nonmembers apply, by their very nature and origins, to exercises of judicial power every bit as much as they do to exercises of regulatory power. Pet. App. at 8; *accord Yellowstone County*, 96 F.3d at 1175. Petitioners and their amici present three basic arguments for carving out a judicial powers exception, none of which is tenable. Petitioners' initial argument is that *Montana*, *Brendale*, and *Bourland* did not speak to tribal adjudicatory jurisdiction and thus did not alter the general rule they claim was

enunciated in what the court of appeals called the "adjudicatory jurisdiction" cases of *Williams v. Lee*, 358 U.S. 217 (1957), *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual*: that Indian tribes retain full "territorial" jurisdiction over all persons on the reservation unless that jurisdiction has been expressly divested by Congress. Br. of Pet'rs at 23-24. Second, Petitioners argue that the involved highway right-of-way is "Indian land," thus taking this case outside the factual context of the "regulatory jurisdiction" cases. Br. of Pet'rs at 19-23. Petitioners' amici make one additional argument meriting a response: that general conflict-of-laws principles support the notion that Indian tribes' adjudicatory authority may exceed their regulatory authority. Br. for United States as Amicus Curiae at 20-21; Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 12-13.

A. The Petitioners Incorrectly Portray *Williams v. Lee*, *National Farmers Union* and *Iowa Mutual* as Addressing the Merits of the Tribal Adjudicatory Jurisdiction Issues.

Petitioners plainly misread the "adjudicatory jurisdiction" cases. The holding of the first, *Williams v. Lee*, was that the Arizona state courts lacked jurisdiction over an action brought by a nonmember against a tribal member to enforce an on-reservation commercial agreement. The Court grounded its opinion in Arizona's failure to seek such jurisdiction under Public Law 280 and because the exercise of jurisdiction by a state court over an Indian "would undermine the authority of tribal courts over Reservation affairs" under the circumstances of that case. 358 U.S. at 223. The Court's discussion of tribal court

jurisdiction therefore was directed at explaining the absence of state court jurisdiction and why it was reasonable for a nonmember who had done business with a tribal member on a reservation to resort to tribal court to enforce his contract. *Id.* While the *Williams v. Lee* Court implicitly found that the involved tribal member could have been made an involuntary defendant in tribal court, it did not speak to the converse situation, i.e., whether a nonmember may be made an involuntary defendant in tribal court.

In the other two cases, *National Farmers Union* and *Iowa Mutual*, this Court did not hold that the tribal court had jurisdiction over the nonmember tribal court defendant. It held that the tribal court would have the first opportunity to decide whether jurisdiction existed. *Iowa Mutual*, 480 U.S. at 19; *National Farmers Union*, 471 U.S. at 857. Thus, in *National Farmers Union* this Court explained, after citing to several civil regulatory cases,⁴ that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." The *National Farmers Union* Court did not

⁴ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (state authority to regulate nonmember hunting on reservation); *Merrion*, 455 U.S. at 137 (tribal authority to impose tax on oil and gas lessee); and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("*Colville*") (tribal authority to impose sales tax on nonmember cigarette purchasers at tribal smoke shops).

address the merits of the jurisdictional issue, since to have done so would have defeated the very purpose of the exhaustion requirement and the availability of collateral federal court review under 28 U.S.C. § 1331 upon such exhaustion. 471 U.S. at 855-56.

The issue in *Iowa Mutual* was not whether the involved tribe had adjudicatory jurisdiction over the underlying personal injury suit but whether diversity jurisdiction existed under 28 U.S.C. § 1332 to entertain the insurer's contract coverage claim *against* a tribal member. See *Iowa Mutual*, 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part). The Court's reference to "civil jurisdiction" presumptively lying in tribal courts as to nonmember activity "unless affirmatively limited by a specific treaty provision or federal statute" thus was not intended to prescribe a new test for determining any jurisdictional challenge which might be mounted later, since such a rule would conflict directly with the standard articulated two years earlier in *National Farmers Union* and, in any event, would be inconsistent with the inherent tribal authority decisions the Court pointed to immediately preceding that statement – *Montana* and *Colville*. Rather, this aspect of *Iowa Mutual* must read in the context of the insurer's attempt to use diversity jurisdiction to sue a tribal member with respect to a claim growing directly out of a reservation accident. In short, *Iowa Mutual* presented an issue with respect to the exercise of diversity jurisdiction analogous to that in *Williams v. Lee* – a fact the Court made clear by its citation to *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), a case concerned with state court jurisdiction over an

adoption proceeding where all parties were tribal members residing on a reservation; it did not intimate the answer to, and instead expressly reserved for later litigation if necessary, the question whether the Blackfeet tribal court possessed jurisdiction over the insurer. 480 U.S. at 19, 20 n.13. It is thus unsurprising that four members of the Court rejected Petitioners' expansive reading of this aspect of *Iowa Mutual* in *Brendale*. See *Brendale*, 492 U.S. at 427 n.10 (White, J.).⁵

B. The Fact That the Tribes May Retain a Servient or Reversionary Interest in the Subject Highway Right-of-Way Does Not Render It "Indian Land" For Jurisdictional Purposes.

Petitioners suggest that since the involved automobile accident took place on a right-of-way granted to the State of North Dakota under the Indian Rights-of-Way

⁵ Petitioners' amici additionally suggest that the existence of tribal court jurisdiction over the instant matter is demonstrated by the fact that Congress passed various acts relating to tribal courts based on the understanding that they possessed full territorial jurisdiction. Br. for United States as Amicus Curiae at 3-6; Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 8-11. However, nowhere in the statutes to which the amici refer did Congress actually delegate such authority to tribal courts. In the absence of a specific delegation, Congress's assumptions, aspirations or policies are simply irrelevant to the question whether the tribal court possesses such authority as an attribute of the tribes' inherent powers that owe their existence to authority predating this continent's discovery by Europeans, much less this Nation's formation. Simply put, Congress can delegate federal authority to tribes at least in some circumstances (e.g., *Mazurie*, 419 U.S. at 556-58), but it cannot confer nonfederal, inherent powers by legislative fiat.

Act (Act of Feb. 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328)), under which grant they allegedly retain servient and reversionary interests, that *Montana's* rule of implicit divestiture does not apply. Br. of Pet'rs at 19-22. This argument misapprehends the general principles, explained most recently in *Bourland*, which are used to determine the existence of inherent tribal authority over nonmembers. There, the Court explained that such a power is an incidental, or lesser-included, element of its greater power to exclude nonmembers from its territory. *Bourland*, 508 U.S. at 691 ("an abrogated treaty right of unimpeded use and occupation of lands 'can no longer serve as the basis for tribal exercise of the lesser included power' to regulate"). It was not important how a tribe's exclusionary powers were extinguished: "[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control". *Id.* at 692.

Since under the Indian Rights-of-Way Act the Secretary of the Interior must obtain consent of the landowner (25 U.S.C. § 324) and must pay just compensation for the interest granted (*id.* § 325), it is plain that Congress "envisioned [that the] Indian interest in the land affected would be extinguished." *Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1192 (D. Ariz. 1982), *vacated on mootness grounds*, 574 F. Supp. 710 (D. Ariz. 1983). Accordingly, "[i]t is axiomatic that designating these lands as a [highway] open to the general public is wholly inconsistent with an intent to allow the continued right of Indian occupancy." *Id.* Most important presently is the fact that,

as a result of the establishment of the right-of-way, the Three Affiliated Tribes retained no power to exclude nonmembers, rendering the highway the functional equivalent of the non-Indian fee land in *Montana* or the taken area in *Bourland*.

C. Amici's Contention That a Sovereign's Adjudicatory Authority May Exceed Its Legislative Authority Is Incorrect.

The United States and several other of Petitioners' amici attempt to draw support for their territorial jurisdiction argument by analogy to domestic conflict-of-laws principles. While beginning this argument with the unremarkable proposition that "[u]nder traditional choice of law principles, courts of one sovereign often adjudicate disputes using the substantive law of another sovereign" (Br. for United States as Amicus Curiae at 20), they then move to an entirely remarkable one: "[A] sovereign's adjudicatory jurisdiction commonly exceeds its powers to impose substantive rules of conduct" (*id.* at 20-21). *Accord* Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 12. Their argument fails for a number of reasons.

As a threshold matter, the broad assertion that the authority possessed by a sovereign's judiciary may exceed that of its executive or legislative branches is simply wrong. As the court of appeals noted, when deciding a case a court imposes normative principles that assign rights and responsibilities to the involved parties and thereby regulates their conduct. *BMW, Inc. v. Gore*, 116 S. Ct. 1589, 1597, n.17 (1996); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). The same is no

less true when a forum court applies the law of a foreign jurisdiction to resolve a controversy, since the underlying choice-of-law decision is governed by forum law. See generally Francis Wharton, *A Treatise on the Conflict of Laws* § 1a, at 10-11 (Parmele ed. 1905) ("when the Court of one state applies the law of another state, . . . it really applies a rule of the common law of the forum").

Aside from the quite practical fact that adjudication is a form of regulation, it cannot be forgotten that a court is created by and is no more than an instrument of the court's sovereign. Its "authority derives from constitutional provisions or from statutory provisions adopted in the exercise of a legislative authority, express or implied, to establish courts and provide for their jurisdiction." *Restatement (Second) of Judgments* § 11, cmt. a (1980). The jurisdiction of a sovereign's courts is thus simply a manifestation of the sovereign's more general power to affect the legal interests of persons. But if the sovereign itself does not have the power as a matter of its own inherent authority to affect a particular interest, a fortiori, its courts do not. Cf. *Restatement (Third) of Foreign Relations Law of the United States* § 431, cmt. a (1987) ("Under international law, a state may not exercise authority to enforce a law that it has no jurisdiction to prescribe").

It therefore is important, particularly in the context of tribal adjudicatory authority, to examine the power of the tribe itself to govern the relationship giving rise to the dispute. Indian tribes, as discussed above, hold a sui generis position within our legal system. They are not States, and their courts are not state courts. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). It is inappropriate simply to pluck principles from a body of

law developed in a specific context and apply them elsewhere without carefully considering why they were developed, how they are intended to work, and what reciprocal responsibilities are attendant to them.

For example, when this Court considers the scope of state court jurisdiction it does so in the context of the textual role that States have within the constitutional structure. (U.S. Const. Amend. X; see also *Merrion*, 455 U.S. at 168 n.17 (Stevens, J., dissenting)) and the limitations on state authority otherwise contained in that structure (e.g., U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause); U.S. Const. Art. IV, § 2 (Privileges and Immunities Clause); U.S. Const. Amend. XIV (Due Process Clause); U.S. Const. Amend. XIV (Equal Protection Clause)). The Court thus begins its analysis of state court authority

with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States.

Tafflin v. Levitt, 493 U.S. 455, 458 (1990). However, at least with respect to external relations, *Montana* teaches that neither Indian tribes nor their courts can lay claim to the same axiom or presumption. See *Merrion*, 455 U.S. at 168-73 (Stevens, J., dissenting); cf. *Brendale*, 492 U.S. at 429 (White, J.) (criticizing lower court's equation of tribal

inherent authority with a local government's police power).

The United States implicitly acknowledges the awkward result achieved by its approach in advancing the argument that the merits of federal, but presumably not state or tribal, law-based tribal court decisions should be reviewable. Br. for United States as Amicus Curiae at 23 n.13. In making this argument the United States first fails to explain why a tribal court's exercise of a tribal court's authority over "an ordinary private civil dispute" would be immune from challenge on jurisdictional grounds, while challenges to the "taxing or regulatory authority of the Tribe itself" would not. *Id.* at 17 n.10. It also fails to reconcile its suggestion that federal courts will stand as courts of appeal for federal legal questions decided by tribal courts with *Iowa Mutual*, where the Court explained that, "[u]nless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." 480 U.S. at 19.

But even assuming that federal courts may stand in review of tribal court federal law-based decisions on nonjurisdictional issues, the United States fails to explain how its proposed rule is relevant here where it also suggests that state law governs. Br. for United States as Amicus Curiae at 23. Since it is unlikely the United States is suggesting that state courts are similarly entitled to entertain appeals from tribal courts, how does the United States propose to prevent States from becoming balkanized through unreviewable tribal court interpretations of state law? It is plainly untenable to suggest that a

North Dakota statute, for example, may be subjected to final interpretations by four different courts: the North Dakota Supreme Court and three different tribal appellate courts. Such an approach would frustrate the States' ability to implement their laws and policies in a consistent manner and undermines fundamental elements of state sovereignty. Furthermore, given the concurrent jurisdiction of state courts alluded to by the United States, adopting its approach would create the specter of forum-shopping and interjurisdictional conflict.

The Government's argument, in short, makes no practical or legal sense other than to further its own interests when consigned (improperly in the amici States' view) to tribal court for the purpose of litigating federal law claims. See *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996); *United States v. Plainbull*, 959 F.2d 724 (9th Cir. 1992). The more logical response to the United States' concern is that tribal courts possess jurisdiction over nonconsenting nonmembers for the purpose of applying tribal, not federal or state, law to the merits of a dispute because they cannot adjudicate that which they cannot regulate. That response does not conflict with *Iowa Mutual's* admonition concerning nonreviewability of the merits of tribal court decisions since there tribal law was assumed to govern resolution of the underlying tort claim. *Iowa Mutual*, 480 U.S. at 12, 17; see also *id.* at 22 n.* (Stevens, J., concurring in part and dissenting in part).

III. THE RESPONDENTS DID NOT CONSENT TO TRIBAL COURT JURISDICTION, AND THE SECOND MONTANA EXCEPTION DOES NOT OTHERWISE PROVIDE A BASIS FOR DIRECT TRIBAL AUTHORITY.

As a fallback Petitioners argue that the involved automobile accident was a "reasonably foreseeable" consequence of Respondents' contract with the Tribes for purposes of the first *Montana* exception (Pet. Br. at 27-28) and that, with respect to the second *Montana* exception, Respondents' allegedly tortious conduct against a member of the "reservation community" threatened the Tribes' economic security and political integrity (*id.* at 29-30). If either of these arguments were adopted, the principles of *Montana* and its progeny would be emasculated.

A. *Montana's* Consent Exception Should Not Be Construed So Broadly as to Swallow the General Rule.

No tenable argument can be made that Respondents consented to tribal court jurisdiction. Literally read, the first *Montana* exception provides that the tribes may regulate nonmembers who enter into "commercial deal[s], contracts, leases, or other arrangements" with the Tribe or its members. *Montana*, 450 U.S. 565. However, as the court of appeals observed, this case involves a "simple personal injury . . . claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit [of] the subcontract between the tribes and A-1." Pet. App. at 21. It is irrelevant that at the time of the accident respondent Stockert was performing

services attendant to A-1 Contractors' agreement with the Tribes, because he possessed the right to be on the state highway independently of his employer's contractual relationship with the Tribes.

Put differently, Stockert required no permission from the Tribes to drive A-1 Contractors' vehicle on the highway, since no question exists that the Tribes were, and are, powerless to control access to that road and have not attempted to do so. See *Bourland*, 508 U.S. at 693 (reservation of mineral, grazing and timber rights in taken lands did "not operate as an implicit reservation of all former rights"); *Brendale*, 492 U.S. at 439 (Stevens, J.) (distinguishing between "open" and "closed" areas of a reservation where the tribes "operate[d] a 'courtesy permit system' that allows selected groups of visitors access to the closed area"). A contrary result would mean that, in *Montana*, the Crow Tribe could have established consent jurisdiction over nonmembers who hunted and fished on nonmember fee lands because they purchased ammunition or fishhooks from a tribally-owned store or that, in *Colville*, nonmembers traveling to or from tribal smoke-shops could be sued in tribal court for accidents occurring on the highway because they had consented impliedly to tribal regulatory jurisdiction by the intended or actual purchase of cigarettes. In sum, unless the consent exception is transformed into a species of legal fiction where actual consent to tribal jurisdiction is not required, the predicate for that exception's application is absent here. Nothing in the Tribes' contractual relationship with A-1 Contractors, so far as the record shows, speaks to the issue of tribal law governing liability for

accidents with third parties like petitioner Gisela Fredericks.

B. The Second *Montana* Exception Does Not Provide a Basis for Direct Tribal Authority Over Nonconsenting Nonmembers.

While the court of appeals correctly concluded that the tribal court did not possess authority over the Respondents under the second *Montana* exception, the amici States submit that it did so for the wrong reason: After *Brendale*, it is no longer appropriate to contend that the second exception can serve as an independent basis for tribal authority over nonmembers but instead serves to identify tribal interests which may be protected by proceedings in federal or state courts. Central to this conclusion is a proper understanding of how the second *Montana* exception was explained in *Brendale*.

Brendale involved the question whether the Yakima Nation had authority to impose its zoning ordinance on two different parcels of land owned in fee by nonmembers of the Nation. The parcel owned by Philip Brendale was located in an area of the Reservation which was almost wholly Indian-owned and which had traditionally been closed to non-Indian entry. 492 U.S. at 415-16. The other parcel was owned by Stanley Wilkinson and was located in an area of the reservation where, by virtue of allotment-era policies, access was not restricted and over half of the land was owned by nonmembers of the Tribes. *Id.* at 416-17. In three plurality opinions the Court upheld the Tribes' power to enforce its zoning ordinance with respect to the Brendale parcel (*id.* at 444) but denied the

Tribes' power to do so with respect to the Wilkinson land (*id.* at 432).

Justice White, who wrote the controlling opinion with respect to the Wilkinson parcel, explicitly rejected the notion that any "direct effect" on a protectable interest may form a basis for the exercise of inherent authority over nonconsenting nonmembers. Stressing the use of the word "may" in the formulation of the second *Montana* exception (450 U.S. at 566), Justice White reasoned that employment of the conditional term "indicate[d] . . . that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances." *Brendale*, 492 U.S. at 428-29. Justice White then explained that the lower court had incorrectly "transform[ed] this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest." *Id.* at 429.

In the context of zoning regulation, Justice White found the prospect of tribal regulation "chaotic" because the tribe's jurisdiction "would last only so long as the threatening use continued," would "depend in the first instance on a factual inquiry into how a tribe's interests are affected by a particular use of fee land," and would likely "switch[] back and forth" with county regulation, "depending on which uses the county permitted on the fee land at issue." *Id.* at 429-30. Instead, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate

the use of fee land" (*id.* at 430) (emphasis added) but rather that:

Montana suggests that in the special circumstance of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. This standard will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners.

Id. at 430-31 (emphasis added). Justice White thus clarified that the second *Montana* exception does not serve as a basis for direct tribal authority but instead that a complainant tribe's recourse lies in a federal-law cause of action designed to protect the interests identified in the exception, as Justice Blackmun correctly recognized. 492 U.S. at 460 (Blackmun, J., concurring in part and dissenting in part).

Justice Stevens agreed with this aspect of Justice White's opinion, although on somewhat narrower grounds. He distinguished between what he characterized as the "closed" and "open" areas of the Yakima

Reservation, and with respect to the former found *Montana's* presumption against tribal authority over nonmembers inapplicable. *Id.* at 443. With respect to the "open" area, i.e., an area where federal laws had operated to deprive the tribe of territorial exclusivity, Justice Stevens concurred with Justice White "that the tribe lacks authority to regulate the use of [petitioner] Wilkinson's property," explaining that "so long as [Wilkinson's] land is not used in a manner that is preempted by federal law, the Tribe has no special claim for relief." *Id.* at 445 (emphasis added). Given the context, it is clear that the "special claim for relief" to which Justice Stevens was referring was the one discussed earlier by Justice White. This understanding of Justice Stevens' opinion also comports with his concern, expressed earlier, over subjecting nonmembers to the powers of governments to which they have not given their consent and in which they cannot participate. *Merrion*, 455 U.S. at 172-73 (Stevens, J., dissenting). Thus, as to the open area, Justice Stevens did not view the second exception as relevant.

Bourland did nothing to alter this aspect of *Brendale*. It simply reaffirmed the rule announced in *Montana* that "when Congress . . . broadly opened up [reservation] land to non-Indians, the effect of that transfer [was] the destruction of [any] pre-existing Indian right to regulatory control." *Bourland*, 508 U.S. at 692. While the *Bourland* Court did observe that on remand "[t]he question remains . . . whether the Tribe may invoke" (*id.* at 695) either of *Montana's* exceptions, it did not suggest that such invocation necessarily meant that, if met, the tribe would be able to exercise direct regulatory authority over nonmembers. It would make little sense to conclude that

in this remark the *Bourland* Court intended the lower courts to apply *Montana* to the exclusion of the otherwise relevant portions of *Brendale*. Instead, the more reasonable understanding is that the Court contemplated that the lower court's application of *Montana* on remand would proceed with due regard for all controlling authority, including *Brendale*.

The amici States submit that the reasoning of Justice White with respect to the second *Montana* exception, i.e., that it does not provide a basis for finding direct tribal authority over nonconsenting nonmembers but instead serves to identify a federal interest that may be enforced against nonmembers in federal or state forums, should be explicitly adopted by the Court. The reasons for this are two. First, the second *Montana* exception does not function as a predictable, principled and objective mechanism for determining when and where tribal authority over nonconsenting nonmembers exists. As noted by amicus curiae Yavapai-Apache Tribe, cases decided by the lower courts under the second *Montana* exception have varied at the whim of the decisionmaker. Br. of Amici Curiae Yavapai-Apache Nation, et al. at 25 n.22. In those cases the concepts of "direct effect," "health and welfare," "political integrity" and "economic security" have been interpreted as encompassing both very much and very little. The explanation for these seemingly incompatible results lies in the fact that the second exception calls as much for a value judgment as for the determination of an objectively ascertainable fact. Because of this, in the hands of some decisionmakers it can be applied so as to swallow the presumptive rule. See generally Bradley B.

Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 263 (1991).

Second, and more important, Justice White's approach strikes an appropriate balance between the interests of the tribe and those of nonconsenting nonmembers. It is not possible to square the notion that Indian tribes have the power to "impose [their] public policy . . . on those outside [their] community" (*Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474 n.9 (9th Cir. 1989)), with the principle that it is "the consent of the governed [that] provides the fundamental basis for power within our constitutional system." *Duro*, 495 U.S. at 694. Justice White's approach allows for the recognition and enforcement of a tribe's laws and policies, but does so with respect to nonconsenting nonmembers through the intermediation of courts to which the latter have consented and which accord them the full panoply of constitutional protections as a matter of right. Moreover, viewing the second *Montana* exception in this manner will ultimately free a tribal court to adjudicate disputes over which it does have jurisdiction in ways that are fully consistent with its own laws, customs, and practices since they will govern the controversy's outcome. The amici States thus submit that the rule which should govern this and like cases is that Indian tribes may exercise governmental powers over a nonmember where the nonmember has consented unequivocally to such power consistent with the principles outlined above. See generally Gould, 96 Colum. L. Rev. at 901.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL
COURT OF THE THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD INDIAN RESERVATION, ET AL., PETITIONERS

v.

A-1 CONTRACTORS AND LYLE STOCKERT, RESPONDENTS

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE AMERICAN TRUCKING
ASSOCIATIONS, INC., THE AMERICAN
AUTOMOBILE ASSOCIATION, AND BURLINGTON
NORTHERN RAILROAD COMPANY AS
AMICI CURIAE
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici address the following question:

Whether the Tribal Court of the Three Affiliated Tribes had subject matter jurisdiction over a tort claim against a non-Indian arising out of an accident occurring on a permanent, federally-granted right-of-way located within the boundaries of the Fort Berthold Reservation?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. This Court Has Repeatedly Held That Tribal Jurisdiction Over Non-Indians Is Narrowly Limited	7
II. The Eighth Circuit Properly Concluded That The <i>Montana</i> Exceptions Do Not Apply	13
III. The Historical Record Compels The Conclusion That The Three Affiliated Tribes Have No Civil Jurisdiction Over Non-Indians In The Absence Of Consent	18
IV. The Serious Due Process Problems Raised By Allowing Tribal Courts To Assert Jurisdiction Over Tort Claims Against Non-Indians Counsel Against A Broad Expansion Of Tribal Court Jurisdiction	25
V. This Court Should Act To Resolve The Uncertainty Surrounding Tribal Court Jurisdiction	29
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986)	27
<i>Burlington Northern R.R. v. Estates of Red Wolf and Bull Tail</i> , Nos. 96-35254 and 96-35265 (9th Cir.)	4
<i>Butz v. World Wide, Inc.</i> , 492 N.W.2d 88 (N.D. 1992)	29
<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	25
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991)	26
<i>Fletcher v. Peck</i> , 6 Cranch 87, 3 L.Ed. 162	11
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	7, 24
<i>In re Murchison</i> , 349 U.S. 133 (1955)	27
<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat.) 304 (1816)	26
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
<i>National Farmers Union Ins. Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	7, 19, 24, 29

	Page
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	20, 23, 25
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974)	12
<i>Red Wolf v. Burlington Northern R.R.</i> , Civ. No. 94-31 (Crow Tribal Ct.)	3, 26
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	28
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993)	5, 8, 12
<i>Three Affiliated Tribes v. Wold Engineering, P.C.</i> , 476 U.S. 877 (1986)	10, 21
<i>United States v. Bedonie</i> , 913 F.2d 782 (10th Cir. 1990), <i>cert. denied</i> , 501 U.S. 1253 (1991)	26
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	8
<i>Wellman v. Chevron U.S.A., Inc.</i> , 815 F.2d 577 (9th Cir. 1987)	30
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	10
<i>Wilson v. Marchington</i> , No. 96-35145 (9th Cir.)	4, 26

	<i>Page</i>
<i>Miscellaneous:</i>	
25 U.S.C. § 1302	24
1834 Trade and Intercourse Act, ch. 161, § 16, 4 Stat. 729, 731	21
Act of March 30, 1802, ch. 13, §§ 4 & 14, 2 Stat. 139	21
<i>The Ethnic Newswatch</i> , Vol. 17, No. 8 at 13 (Aug. 31, 1996)	15
<i>The Ethnic Newswatch</i> , Vol. 8, No. 36 at 3 (June 21, 1996)	15
Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328 . . .	12
Opinion of Attorney General Cushing, 7 Op. Atty Gen. 174 (1855)	21
F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMA- TIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 (1962)	21
Treaty with the Cherokee in 1798, 7 Stat. 62	20
Treaty with the Osage, 1808, 7 Stat. 107	20
Treaty with the Quapaw, 1818, 7 Stat. 176	20
Treaty with the Sauk and Foxes, 1804, 7 Stat. 84 . . .	20

	<i>Page</i>
Treaties with Three Affiliated Tribes, 7 Stat. 259, 7 Stat. 261, and 7 Stat. 264 (1825)	19-20
Treaties of Oct. 21, 1867, 15 Stat. 581 and 15 Stat. 581	21
Treaty of Oct. 28, 1867, 15 Stat. 593	21
Treaty of March 2, 1868, 15 Stat. 619	21
Treaty of April 29, 1868, 15 Stat. 635	21
Treaty of May 7, 1868, 15 Stat. 649	21
Treaty of May 10, 1868, 15 Stat. 655	21
Treaty of June 1, 1868, 15 Stat. 667	21
Treaty of July 3, 1868, 15 Stat. 673	21

INTEREST OF THE AMICI*

The American Trucking Associations, Inc. ("ATA"), the American Automobile Association ("AAA"), and Burlington Northern Railroad Company ("BN") appear in this case as amici because they have a vital interest in ensuring that tort claims arising out of accidents occurring on federal rights-of-way within the boundaries of an Indian reservation are adjudicated fairly, in a manner that fully comports with fundamental principles of due process.

ATA is the national trade association of the trucking industry. Through 51 affiliated state trucking associations (located in every state and the District of Columbia), 14 affiliated national organizations and more than 4,500 direct member companies, ATA represents over 34,000 motor carriers and trucking suppliers, including both for-hire and private carriers, insurance companies, truck leasing companies, and equipment manufacturers. Members of the nation's trucking fleet frequently travel over Indian lands as they transport freight and commodities throughout and across the western United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AAA is a non-profit federation of 102 motor clubs, representing more than 39 million motorists in the United States and Canada. Nearly 23 percent of the passenger vehicles registered in the U.S. and Canada belong to AAA members. These members are served by a network of more than 1,000 AAA offices, which provide travel, insurance, financial and automotive services.

BN is one of the nation's largest railroads. Operating on rights-of-way granted by the federal government more than a century ago, BN's trains cross 27 different Indian reserva-

* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

tions each day in the western United States. Members of ATA and AAA are also required, on a daily basis, to traverse many different reservations on state and federal highways which, like the state highway where the accident occurred in this case, are located on permanent rights-of-way granted across reservation lands. Avoiding contacts with Indian reservations is a practical and legal impossibility for BN, which cannot relocate its tracks. It is also difficult, if not impossible, for ATA and AAA members to avoid crossing reservation lands on a regular basis as they travel on major highways in the West.¹

BN and the members of ATA and AAA strive to avoid accidents; yet accidents do occur. If petitioners in this case were to prevail on their theory of territorial sovereignty, BN and other non-Indians who have no choice but to cross reservation lands would always be subject to tribal court jurisdiction whenever an accident occurred within the boundaries of any reservation that has its own tribal court. That result is deeply troubling because tribal courts are inherently ill-suited to provide a fair and impartial forum for the adjudication of substantial tort claims against outsiders.

Tribal courts were established for the primary purpose of adjudicating civil and minor criminal disputes among members of the tribe. As a result, many, if not most, tribal codes limit participation on juries to members of the tribe. Even if the available jury pool includes non-members who live on the reservation, most reservations are by their very nature relatively small and close-knit communities. When the litigation concerns criminal matters or a dispute between members of the tribe, the insular nature of the tribal court

¹ A good example is Interstate 25, which crosses four different Indian reservations in the sixty-mile stretch between Albuquerque and Santa Fe, New Mexico.

does not pose any particular problem. On the contrary, the tribal court is uniquely qualified to apply the often unwritten laws and customs of the tribe. But when the dispute is a tort claim, often seeking very large damages, brought by a member of the tribe (or, as here, a long-time resident of the reservation) against a non-Indian outsider, the tribal court can all too easily become a vehicle for the deprivation of the outsider's right to due process.

This is not just an abstract fear. In 1995, BN was sued in tribal court on the Crow Reservation in Montana by the survivors of two members of the tribe killed in a railroad crossing accident on the reservation. *Red Wolf v. Burlington Northern R.R.*, Civ. No. 94-31 (Crow Tribal Ct.). In 1996 the case was tried to a jury made up entirely of members of the tribe, including some who were relatives of the plaintiffs. During jury selection, many potential jurors expressed a deep-seated bias against the railroad. That bias was echoed by the court itself when a judge (who was not presiding over the case) addressed the venire panel in the Crow language, telling them

"A train runs through the middle of our land, Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day."

Although the evidence showed that the driver and her mother were intoxicated at the time of the accident, the jury found BN 100% liable for wrongful death and awarded the five heirs what the jury described as "compensatory" damages in the astonishing amount of \$250 million.²

² After the tribal court refused to stay enforcement of the judgment unless BN put up security for the entire amount, BN sought and obtained a federal court injunction against enforcement. Plaintiffs appealed to the Ninth Circuit, where the case was argued in September 1996. *Burlington*

Although BN's experience may be the most outrageous example of the potential for abuse in the tribal court system, it is by no means an isolated phenomenon. In *Wilson v. Marchington*, No. 96-35145 (9th Cir.), the Blackfeet Tribal Court awarded the plaintiff approximately \$250,000 for injuries she suffered when defendant's truck collided with plaintiff's vehicle while passing through the reservation on U.S. Highway 2. Complaining of, among other things, the assertion of tribal court jurisdiction, the defendant appealed to the recently created Blackfeet Supreme Court—only to be faced with a judge who, as a practicing lawyer in the tribal courts, represented clients on the opposite side of the very jurisdictional issue he was asked to decide.³

Amici believe that the concept of retained sovereignty and tribal self-government cannot be stretched to include jurisdiction over tort claims arising out of any and all events that happen to occur on the reservation. On the contrary, in light of the historical record, this Court's own precedents, and legitimate concerns for protecting the rights of non-Indian defendants, amici urge the Court to adopt instead a rule that would preclude tribal court jurisdiction, absent the defendant's consent, over tort claims against non-Indians arising out of accidents on state or federal rights-of-way.

SUMMARY OF ARGUMENT

I. Contrary to the impression petitioners and the amici who support them try to create, this Court has never held that tribal courts have presumptive jurisdiction over all claims arising out of all accidents occurring within the

Northern R.R. v. Estates of Red Wolf and Bull Tail, Nos. 96-35254 and 96-35265.

³ The U.S. district court in Montana ordered enforcement of the tribal court judgment; that decision is currently on appeal to the Ninth Circuit.

boundaries of the reservation. Throughout their brief, petitioners confuse this Court's general pronouncements about a tribe's authority over its lands and members with the question of tribal jurisdiction over non-Indians. In case after case, this Court has made it clear that the tribes' retained jurisdiction over non-Indians is narrowly limited and can be invoked only in situations where there is consent or where the exercise of jurisdiction is vital to the ability of the tribe to govern or protect itself. See *Montana v. United States*, 450 U.S. 544 (1981).

The general presumption against tribal jurisdiction articulated in *Montana* is not limited, as petitioners contend, to the "regulatory"—as opposed to the "adjudicatory"—context. Nor is it limited to situations where an accident occurs on land held in fee by non-Indians. A tribe's power to regulate the conduct of non-Indians is a function not of the ownership of the land where the conduct occurs, but rather of the tribe's ability to exclude non-Indians from using the land. In *South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993), this Court explained that "regulatory authority goes hand in hand with the power to exclude." When the power to exclude non-Indians from the land is eliminated, so too is the "incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.* at 689. In this case, the Tribes gave up any right to exclude outsiders from the state highway where the accident occurred when they consented to the federal grant of a perpetual easement to the State. Having given up the right to exclude outsiders, the Tribes also necessarily gave up whatever jurisdiction they might otherwise have had over those outsiders.

II. The only exceptions to this basic rule are those set forth in *Montana*. Petitioners and their amici urge the Court to construe the *Montana* exceptions in the broadest possible manner so that they effectively swallow the rule. Instead, the exceptions should be construed narrowly in accordance with

the general presumption against tribal jurisdiction articulated in *Montana*. Thus, consent to tribal court jurisdiction should be found only where there is *actual* consent to adjudication of a particular claim or class of claims in tribal court. And, if the second *Montana* exception applies at all in this context, tort claims should never be found to implicate the tribe's ability to protect itself except in those rare cases where it can be shown that the established tort system existing outside the boundaries of the reservation is inadequate to protect an important tribal interest.

III. The historical record, including treaties and agreements between the Three Affiliated Tribes and the United States, fully supports the conclusion that tribal courts have no jurisdiction over non-Indians in the absence of consent. In their brief, petitioners ignore the history of the relationship between the Tribes and the United States government, focusing instead on metaphysical concepts of sovereignty. A review of the historical record, however, leads inevitably to the conclusion that, at the time the Tribes were incorporated into the territory of the United States and became "dependent sovereigns," no one believed that tribal courts would exercise jurisdiction over claims by members of the Tribes against non-Indians. Instead, the assumption was that non-Indians would enter onto Indian lands only if specifically authorized to do so by the United States Government and that any injuries inflicted on members of the Tribes by outsiders would be remedied by the United States Government.

IV. Because there are serious due process problems with the extension of tribal court jurisdiction over tort claims against non-Indians, this Court should be particularly careful not to stretch to find retained jurisdiction. By their very nature, tribal courts are ill-suited to adjudicate claims by members of the tribe or their families against outsiders. Furthermore, because the extent of judicial review available outside of the tribal court system is far from clear, there are

no real constraints on tribal courts to ensure that all litigants, including non-Indian defendants, are afforded due process and equal protection of the law.

V. Uncertainty over both the extent of tribal court jurisdiction and the availability of federal or state court review of tribal court judgments, combined with the exhaustion rule adopted by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), has created a quagmire for litigants on both sides of disputes arising out of accidents on Indian reservations. This Court can and should resolve at least some of that uncertainty now, by adopting a bright-line test limiting tribal court jurisdiction of tort claims against non-Indians to situations where the defendant has explicitly consented to such jurisdiction. At the very least, such a rule should be adopted for tort claims arising out of accidents on federally-granted rights-of-way, enabling such claims to be resolved in a prompt and fair manner for all parties concerned, without lengthy disputes over the proper forum.

ARGUMENT

I. This Court Has Repeatedly Held That Tribal Jurisdiction Over Non-Indians Is Narrowly Limited.

In their briefs, petitioners and their amici quote every statement this Court has ever made to the effect that Indian tribes retain jurisdiction over their lands and members. With the possible exception of the dicta in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), however, the Court has never even remotely suggested that tribal courts presumptively have subject matter jurisdiction over non-Indians whenever an accident arises within the external boundaries of the

reservation.⁴ On the contrary, there is a whole line of authority, which petitioners and the amici supporting them largely ignore, holding that there is a presumption *against* tribal power over the activities of non-Indians.

In *Montana v. United States*, 450 U.S. at 563-64, this Court explained that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." One of the attributes that has been lost is the ability to control the tribe's relationship with outsiders. As the Court explained in *United States v. Wheeler*, 435 U.S. 313, 326 (1978), the status of Indian tribes as protected and dependent sovereigns "is necessarily inconsistent with their freedom independently to determine their external relations." Thus, any analysis of the limits of tribal power over non-Indians must begin, not with the concept of territorial sovereignty, but rather with the "general proposition that the inherent sovereign powers of an Indian tribe do *not* extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (emphasis added); *see also Wheeler*, 435 U.S. at 326 (tribes have been implicitly divested of the power to control "the relations between an Indian tribe and nonmembers of the tribe").

Indian tribes do retain limited sovereign powers, which relate to the "powers of self-government * * * [and] involve

⁴ *Iowa Mutual* was an exhaustion case; the Court did not purport to be deciding the question of tribal jurisdiction. Indeed, it specifically disclaimed any intention of doing so, deferring to the tribal court to make that determination in the first instance. 480 U.S. at 18. In any event, as the Eighth Circuit majority pointed out, far from rejecting the rule in *Montana v. United States*, which we rely upon, the Court in *Iowa Mutual* specifically cited *Montana* as controlling authority in the very passage petitioners quote as evidence that *Montana* does not apply in the adjudicatory context. 480 U.S. at 18.

only the relations among members of a tribe." *Wheeler*, 435 U.S. at 326. These retained sovereign powers include "the power to punish tribal offenders, * * * [the] inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. But the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without *express congressional delegation*." *Id.* (emphasis added). *See also Bourland*, 508 U.S. at 695 n.15 (citation omitted), where the Court emphatically rejected the claim that tribes have inherent sovereign power over nonmembers within their geographic boundaries with the observation that such an argument "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore not inherent."

Petitioners and their amici have offered a number of reasons why *Montana* should not apply here. They contend that it was wrongly decided or should be limited to its facts. They also argue that *Montana* applies only to the tribes' regulatory authority and not to their ability to adjudicate disputes. Petitioners' main contention, however, seems to be that *Montana* applies only to conduct on land owned in fee by non-Indians and that the tribes retain plenary jurisdiction over activities on land that remains under tribal ownership. Because the Tribes in this case continue to have a reversionary interest in the land underneath the state highway, petitioners contend that the limitations on tribal jurisdiction articulated in *Montana* do not apply.

All of these arguments should be rejected. Far from being wrongly decided, *Montana* accurately reflects the historical reality surrounding the tribes' surrender of full sovereignty to the United States. (See Part III below). The

rationale in *Montana* also cannot be limited to the regulatory context. If a tribe's inherent sovereign powers do not extend to regulating the conduct of non-Indians, it necessarily follows that the tribe does not have the power to use its judicial system to force a non-Indian to pay damages for any alleged misconduct. In a very real sense, the power to impose damages is the power to regulate. The Court recognized that fact in *Williams v. Lee*, 358 U.S. 217 (1959), when it held that a state court could not entertain claims against an Indian defendant arising out of activities on the reservation because state court adjudication of such claims would infringe on the tribe's ability to govern itself.⁵

Petitioners' claim that *Montana* applies only to activities on fee land owned by non-Indians must also be rejected. The Court in *Montana* did not suggest that the limits it recognized on tribal sovereignty are a function of the ownership of the land where the activities in question occurred. Rather, the discussion in *Montana* revolved around the nature of the limited sovereignty retained by the tribes over non-Indians even on their own reservations. The Court quoted and relied

⁵ Petitioners cite *Williams* as authority for the proposition that tribal courts have jurisdiction over *all* claims arising on the reservation, including claims against non-Indians who have not consented to such jurisdiction. The Court in *Williams*, however, did not purport to announce any such broad principle. On the contrary, the Court specifically recognized that the interest in tribal self-government is *not* implicated in situations where claims are brought against a non-Indian. That is true even if the claims arose on the reservation. Thus, the Court observed that state courts could properly assert jurisdiction over suits "by Indians against outsiders" without invading the tribes' ability to govern themselves. 358 U.S. at 219. See also *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 880 (1986), where the Court made the same distinction, noting that a state court could properly recognize "jurisdiction over the claims of Indian plaintiffs against non-Indian defendants * * * because such jurisdiction did not interfere with the right of tribal Indians to govern themselves."

on "Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" 450 U.S. at 565. It then categorically described "the general proposition" as being that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* The Court went on to list what have become known as the "*Montana* exceptions" to this presumption, prefacing its description with the statement that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* The clear implication of this statement is that the *only* jurisdiction the tribes' retain over non-Indians—regardless of where they are located on the reservation—is the limited jurisdiction described in the *Montana* exceptions.

In any event, even if the scope of tribal jurisdiction depended on the nature of the land where the conduct in question occurred, the *Montana* presumption against tribal jurisdiction would still apply in this particular case. The cases subsequent to *Montana* make clear that the key issue in deciding whether a tribe has the power to regulate the use of lands located within the boundaries of the reservation is not who *owns* the land, but rather whether the tribe retains the right to exclude outsiders from using it. In *Bourland*, 508 U.S. at 691 n.11, the Court observed that "regulatory authority goes hand in hand with the power to exclude"; consequently, where, as a result of federal action, a tribe has lost the right to exclude non-Indians from particular lands within the reservation, the tribe ordinarily will not have the power to regulate the use of those lands.

In this case, the United States continues to hold the fee interest in the land underneath the highway for the benefit of the Tribes. But the Tribes' interest in the land is "only a

right of occupancy," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). The Tribes gave that right up more than twenty years ago when they consented to the federal grant of an easement to the State of North Dakota pursuant to the Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328. That grant, which is reproduced in the Appendix to respondents' brief, gives the State a perpetual right to use the land so long as it is used as a highway. The Tribes retain a reversionary interest, but only in the event that the State surrenders or abandons the right-of-way. Having consented to the easement, the Tribes gave up whatever rights they would otherwise have had to exclude anyone from using the highway.

The federal grant of a perpetual easement to the State is indistinguishable from the federal taking of tribal land for flood control purposes that this Court found in *Bourland* to be inconsistent with continuing tribal regulation. Indeed, in that case, the tribe retained much greater rights to continued use of the land than the Tribes have in this case.⁶ The Court recognized that the retention of these rights made the transfer of land different than the transfer of the entire fee interest to a non-Indian in *Montana*. Nevertheless, the Court concluded that the result was the same: "when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." 508 U.S. at 692.

Thus, whether *Montana* is viewed as establishing a general presumption against tribal jurisdiction over non-Indians or as establishing a narrower presumption against tribal jurisdiction over activities on land that the tribe no

⁶ The Cheyenne River Tribe retained mineral rights, as well as grazing, access, hunting and fishing rights. *Bourland*, 508 U.S. at 684.

longer controls, the result in this case will be the same.⁷ Either way, the Court must begin with the presumption that there is no tribal court jurisdiction over claims arising out of accidents on a state highway, unless the proponent of tribal court jurisdiction can demonstrate that one of the *Montana* exceptions applies.

II. The Eighth Circuit Properly Concluded That The *Montana* Exceptions Do Not Apply.

Petitioners argue that, even if the *Montana* rule applies in this case, the exceptions to that rule support the invocation of tribal court jurisdiction. The Court in *Montana* explained that tribes retained the power to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The Court stated that tribes "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Petitioners argue that both exceptions apply here because (i) A-1 Contractors was on the reservation in order to perform a contract it had entered into with a company owned by the Tribes and (ii) the Tribes have a political interest in providing a forum for injured reservation residents and a regulatory

⁷ Because consent is one of the exceptions to the presumption against tribal jurisdiction over non-Indians, there is no real difference between these two alternatives. If the tribe retains the ability to exclude outsiders from particular lands, it can condition the right to use that land on a non-Indian's agreement to abide by the rules set by the tribe. Thus, the "consent" requirement of the first *Montana* exception is likely to be satisfied whenever the tribe retains the right to exclude others from the land in question.

interest in policing negligent behavior on highways running through the reservation.

The Eighth Circuit properly rejected all of these arguments. Petitioners contend that by entering into a contract with the Tribes, A-1 should be deemed to have constructively agreed to submit to the jurisdiction of the tribal court for any tort claims arising out of its presence on the reservation. Petitioners' concept of "consent" to tribal court jurisdiction, however, is vastly overbroad. Taken to its logical conclusion, that concept would subject anyone who entered the boundaries of the reservation to tribal court jurisdiction for any type of claim on the ground that their very presence on the reservation represented constructive consent to any foreseeable lawsuit. Such an exception would swallow the basic rule established in *Montana* that tribes ordinarily will not have jurisdiction over the activities of non-Indians.

To the extent that tribal jurisdiction can be conferred by consent, it should be *real* consent. A non-Indian who enters into a contract with the tribe or a member of the tribe that specifically provides for submission to tribal court jurisdiction should be bound by that agreement. But without such explicit consent, the mere fact that the non-Indian was on the reservation pursuant to a consensual relationship is not enough to confer jurisdiction on the tribal courts over all conceivable claims arising out of the non-Indian's presence on the reservation. That ought to be particularly true in this case, where the contract between A-1 Contractors and the tribal company contained an exclusive forum selection clause selecting the state court in Utah as the forum for any contractual disputes. (J.A. 111 n.5). Having agreed to litigate contract disputes in a state court, A-1 Contractors can hardly be deemed to have "consented" to tribal court jurisdiction over any foreseeable tort claims arising out of its presence on the reservation.

The second *Montana* exception also does not apply. Plaintiffs' claim that jurisdiction over tort claims is necessary to preserve their political integrity as sovereigns—apart from being hopelessly circular—is limitless, allowing tribal courts to assume jurisdiction over any claim raised by a reservation resident. Similarly, petitioners' claim that jurisdiction must be recognized in order to enable the Tribes to protect the health and welfare of their members would allow a tribe to exercise civil jurisdiction over all accidents that occur on state or federal highways and, indeed, over virtually any tort claim, simply by asserting an interest in discouraging negligent and other wrongful conduct on the reservation.⁸ Such an interpretation of the second *Montana* exception is directly contrary to the fundamental premise of the *Montana* decision, which is that the tribes' status as dependent sovereigns necessarily entails a sharp limitation on their jurisdiction over non-members.

⁸ Indeed, this rationale could be used to allow tribal courts to assume jurisdiction over non-Indians who had never even set foot on the reservation, on the theory that, under principles akin to long-arm jurisdiction, a tribal court has jurisdiction over off-reservation activities that have an impact on the reservation. That such lawsuits are a possibility is not idle speculation. The Tribal Code of the Three Affiliated Tribes specifically provides for long-arm jurisdiction. See J.A. 22. There is currently pending in the Rosebud Sioux tribal court a lawsuit brought by the heirs of Chief Crazy Horse against the makers of Crazy Horse malt liquor seeking damages for the misappropriation of his name. Although the manufacturer is not a resident of the reservation and the product is not even sold in South Dakota, where the reservation is located, the Rosebud Sioux Supreme Court recently reversed a trial court ruling that it lacked personal jurisdiction over the manufacturer. *The Ethnic Newswatch*, Vol. 17, No. 8 at 13 (Aug. 31, 1996); see also *The Ethnic Newswatch*, Vol. 8, No. 36 at 3 (June 21, 1996).

If the second *Montana* exception is to be applied at all to the question of the scope of tribal court jurisdiction,⁹ it should be applied narrowly, to ensure that tribal court jurisdiction is in fact allowed only in those rare cases where the particular conduct in question has in fact had a substantial impact on the tribe as a whole. The Eighth Circuit properly recognized that traffic accidents, by their very nature, do not meet this standard because they impact only the individual and not the tribe as a whole.

Even in situations where an effect can be found on the tribe as a whole, however, that should not be enough, in and of itself, to give the tribe the power to adjudicate claims against a non-Indian. Virtually all tortious acts are already covered by the web of obligations created by the common law, and remedies are available in state and federal court for breach of those obligations. There is no reason to believe that reservation residents are not already adequately protected by existing state laws and state remedies. Thus, a tribe has no need to provide a forum for claims against non-Indians in order to protect the health or welfare of its members as a whole or its interest in tribal self-government.

To hold otherwise would create a potentially chaotic situation where tribal courts would be able to "regulate" the conduct of non-Indians on state and federal highways and other federally-granted rights-of-way by, among other things, developing their own individual tort systems governing

⁹ In their amicus brief, a number of States, through their Attorneys General, demonstrate why the second *Montana* exception should not apply at all to tribal court jurisdiction of tort claims against non-Indian defendants.

accident claims.¹⁰ For if tribal courts were deemed to have a sufficient interest in reducing accidents on those rights-of-way to give them adjudicatory jurisdiction over non-Indians under the second *Montana* exception, it necessarily follows that they would also have a strong enough interest to formulate and apply their own law in deciding liability and imposing damages for such accidents. Indeed, the Constitution adopted by the Three Affiliated Tribes specifically limits the jurisdiction of the tribal court to cases and controversies arising under tribal law and provides that tribal law will be applied in tribal court.¹¹ Thus, it necessarily follows that, if it has jurisdiction over the claims at issue in this case, the tribal court will apply its own law.

In his amicus brief, the Solicitor General urges the Court to postpone for another day the question whether the Tribes may properly apply their own law if the Court concludes that

¹⁰ If the health and safety rationale applied, as petitioners claim, the Tribes would also have the power to directly regulate conduct on the highway by, for example, reducing speed limits, putting up traffic signals, or even excluding certain types of vehicles from the roads. Such an exercise of regulatory authority would be fundamentally at odds with the grant of a permanent easement to the State, which gave the State—and not the Tribes—the power to regulate the highway.

¹¹ Section 2.1 of the Constitution vests the judicial power of the tribe in the Fort Berthold Judiciary and provides that that power "shall extend to all cases and controversies in law, equity, and custom arising under the Laws of the Three Affiliated Tribes." Section 2.5, which is headed "Applicable Law," provides that, in the absence of controlling federal law or tribal ordinance, "the judge may seek authority in the custom, usage, and jurisprudence of the Tribes." That section also provides that state and federal laws that are not applicable to the reservation shall "not be deemed applicable law in any proceeding," except as provided by stipulation of the parties with the consent of the Court; even then, state and federal laws are not to be given any greater authority than tribal laws or customs or usage.

the tribal court has jurisdiction over Mrs. Frederick's claim. But that is potentially a critical question, not only from a legal perspective, but also from a practical point of view. There is a patchwork quilt of Indian reservations throughout the western United States; allowing each tribe to develop its own individual tort law, in addition to the existing state laws, would create a nightmare of conflicting rules.¹²

There may be rare situations where state and federal court remedies are insufficient to protect a strong tribal interest against a non-Indian's allegedly tortious activity on the reservation. But ordinary traffic accidents do not require a unique tribal court remedy and thus should never be deemed to fall within the second *Montana* exception.

III. The Historical Record Compels The Conclusion That The Three Affiliated Tribes Have No Civil Jurisdiction Over Non-Indians In The Absence Of Consent.

The briefs filed in support of petitioners are filled with rhetoric about tribal sovereignty. Yet none of those briefs addresses the most important factor in determining the extent to which a tribe has retained its original sovereignty: the historical record surrounding the tribe's surrender of its sovereignty to the United States. The question of how much sovereignty was "retained" by the tribe is essentially a question of the intent of the tribe and the United States Government. If civil jurisdiction was surrendered, along with other aspects of the tribe's sovereignty, more than a century

¹² The notion that tribal courts might apply fundamentally different standards in judging tort claims is not at all far-fetched. Lawyers for the plaintiffs in the *Red Wolf* case have sought to justify the huge damages for loss of society imposed by the Crow tribal court on the ground that the verdict is based on the Crows' unique perspective on the value of human life.

ago, it necessarily follows that it cannot be revived now absent an express Act of Congress.

This Court recognized the importance of the historical record in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In that case, the Court declined to adopt a bright-line jurisdictional rule for civil tribal court jurisdiction, stating that

the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56. When such an examination is conducted in this case, it becomes apparent that the Three Affiliated Tribes did not retain civil jurisdiction over non-Indians for traffic accidents occurring on a state highway located on the reservation.

The three tribes who together occupy the Fort Berthold reservation entered into three virtually identical treaties with the United States in 1825. See 7 Stat. 259, 7 Stat. 261, and 7 Stat. 264. Significantly, those treaties do not purport to give the Tribes the power to exclude non-members from Indian lands. Instead, they give the United States the explicit power to decide who other than members of the Tribes would be allowed to pass through or reside on the reservation.¹³

¹³ In Article 5 of each treaty the Tribes agreed to extend protection to the persons and property of traders licensed by the United States, as well as to anyone legally authorized by the United States to pass through their country or "sent by the United States to reside temporarily among them." The Tribes also agreed to "apprehend" any person *not* authorized by the

There is no provision in the treaties that recognizes any power on the part of the Tribes to adjudicate disputes involving non-Indians. On the contrary, the treaties explicitly contemplate that the United States Government would resolve any disputes. Disclaiming reliance on "private revenge or retaliation" "for injuries done by individuals," the Tribes agreed that "complaints shall be made, by the party injured, to the superintendent or agent of Indian affairs or other person appointed by the President." Treaties, Article 6. The United States agreed to punish anyone who was not a member of the Tribes for any offense against an Indian "as if the injury had been done to a white man." *Id.* It also agreed to provide full indemnification for any horses or other property stolen by a citizen of the United States from a member of the Tribes. *Id.*

The 1825 treaties were entirely consistent with the "common notions of the day," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), which assumed that tribes would never have nonconsensual jurisdiction—civil or criminal—over non-Indians. Beginning with the Treaty with the Cherokee in 1798, 7 Stat. 62, federal statutes and treaties routinely provided for adjustment of claims against non-Indians by the U.S. Government, rather than by the tribes themselves.¹⁴ In the face of a flood of claims by Indians

United States to enter into their country and turn him over to the Indian agent or some other representative of the United States government.

¹⁴ See, e.g., Act of March 30, 1802, ch. 13, §§ 4 & 14, 2 Stat. 139 (providing indemnification for the loss or damage suffered by either race as a result of acts of the other); Treaty with the Sauk and Foxes, 1804, 7 Stat. 84; Treaty with the Osage, 1808, 7 Stat. 107; Treaty with the Quapaw, 1818, 7 Stat. 176. Later treaties contained similar provisions, providing that Indians who suffered personal injury or property damage as a result of the conduct of non-Indians would submit claims to an Indian agent, who would then forward them to the Commissioner of Indian

seeking indemnity for stolen property and other injuries, the War Department issued instructions to all Indian agents standardizing claims-handling procedures. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834* at 208 (1962). Agents were instructed to forward a report on the Indian's claim both to the War Department and to the "District Attorney where the [non-Indian] person who has done the injury resides," explaining the claim so that "proper legal steps may be taken against the wrong-doer." Circular to Superintendents and Agents (Sept. 5, 1818), quoted in PRUCHA, *supra*, at 209. See also the 1834 Trade and Intercourse Act, ch. 161, § 16, 4 Stat. 729, 731.

Even the 1855 Opinion by Attorney General Cushing, 7 Op. Atty Gen. 174, which is often cited as a contemporary recognition of tribal court civil jurisdiction over non-Indians, suggests that such jurisdiction was limited to situations where a non-Indian had consented by effectively becoming a member of the tribe. In that case, the question presented was whether a tribal court had jurisdiction "over a white man who has voluntarily made himself a Chicasaw by intermarriage and exercise of all the rights of a Chicasaw, and where the question concerns property[,] the proceeds of a head-right[,] granted to him as a Chicasaw." *Id.* at 175. The Attorney General did not invoke any broad principle of territorial jurisdiction in answering that question; rather, he concluded only that Congress, while withholding criminal jurisdiction over any white man, had not chosen to "withhold

Affairs for review and, if they were deemed valid, payment. See *Treaties of Oct. 21, 1867*, 15 Stat. 581 and 15 Stat. 581; *Treaty of Oct. 28, 1867*, 15 Stat. 593; *Treaty of March 2, 1868*, 15 Stat. 619; *Treaty of April 29, 1868*, 15 Stat. 635; *Treaty of May 7, 1868*, 15 Stat. 649; *Treaty of May 10, 1868*, 15 Stat. 655; *Treaty of June 1, 1868*, 15 Stat. 667; *Treaty of July 3, 1868*, 15 Stat. 673.

from [the tribe] civil jurisdiction over such white men as of their own free will and accord choose to become members of the nation." *Id.* at 185. Attorney General Cushing stressed that his opinion did *not* concern the tribe's jurisdiction over persons "trading with the Indians, or sojourning among them," but rather was limited to the specific question presented of a white man who had become a member of the tribe. *Id.* at 185.

Once the historical record is examined, it becomes clear that the notion that tribal courts in general or the Three Affiliated Tribes in particular have jurisdiction to adjudicate claims against non-Indians is a modern invention rather than a reflection of historical reality. Indeed, although the Three Affiliated Tribes have had a Constitution since the 1930s, it was not until the 1980s that they claimed any power to adjudicate claims against non-Indians.¹⁵ The tribal code establishing the Fort Berthold Indian Court originally provided for jurisdiction *only* over suits against a member of the tribe or an Indian over whom the court had jurisdiction. The court's jurisdiction over suits between members and non-members was limited to those "brought before the Court by stipulation of the parties." Tribal Code, Ch. II, § 1 (superseded). It was not until sometime in the 1980s that the Tribe's Constitution was amended to provide for the assertion of broad jurisdiction over the activities of non-Indians on the reservation.

In light of the historical record in this particular case, this Court's decision in *Oliphant* compels the conclusion that the Tribes do not have non-consensual civil jurisdiction over

¹⁵ It is apparent from the Court's opinion in *Three Affiliated Tribes v. Wold Engineering, P.C.*, *supra*, that at the time that case was decided, the tribal code had not yet been amended to provide for tribal court jurisdiction over non-Indians. Indeed, that is why the Tribe sought to bring suit in the North Dakota state court. 476 U.S. at 889.

any kind of a claim against a non-Indian. In *Oliphant*, the Court held unequivocally that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." 435 U.S. at 212. The Court arrived at that conclusion after a lengthy examination of the historical record, which demonstrated that the "unspoken assumption," 435 U.S. at 203, in treaty after treaty throughout the nineteenth century had been that tribes did not have judicial authority over non-Indians.

In addition to reviewing the historical record, the Court also considered the intrinsic limitations on tribal authority created by the tribes' dependent status. Noting that the United States has always manifested a "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty," the Court concluded that by submitting to the overriding sovereignty of the United States, Indian tribes "necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court observed that "[t]his principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'" *Id.* Even though present-day tribal courts have dramatically improved, the Court concluded that the principle "should be no less obvious today." *Id.*

The reasoning applied in *Oliphant* applies with equal force to the Three Affiliated Tribes' assertion of civil jurisdiction over respondents. The historical record, as demonstrated above, shows that both the United States and the Tribes assumed that the Tribes would not have the power to adjudicate civil claims against non-Indians. In addition, since the adoption of the Bill of Rights, the United States has also shown "great solicitude" toward protecting its citizens' property rights against deprivations without due process. At the time they were incorporated into the territory of the United States, the Three Affiliated Tribes did not have a

developed court system and could not have offered non-Indians the due process protections guaranteed to them by the Constitution. Under these circumstances, the only logical conclusion to be drawn from the treaty provisions quoted above is that the Tribes must have given up their power to adjudicate claims against non-Indians.¹⁶

Having relinquished the power to adjudicate such disputes, the Tribes could not unilaterally re-create it a century later by purporting to expand their jurisdiction to include non-Indians. Instead, only Congress has the power to give the Tribes that authority. Congress has not done so, and therefore the tribal court lacked jurisdiction over the claims at issue in this case.¹⁷

¹⁶ We recognize that in *National Farmers Union* this Court declined to apply *Oliphant* to "automatically foreclose" civil jurisdiction over non-Indians in any tribal court. 471 U.S. at 855. But the Court also did not disavow its reasoning in *Oliphant*, leaving the decision with respect to the existence and extent of civil jurisdiction to be decided on a case-by-case basis depending, in large part, on what the historical record showed with respect to each individual tribe. *Id.* at 855-56.

¹⁷ The fact that Congress has authorized funding for tribal courts and that some legislative history repeated the dicta from *Iowa Mutual* about the scope of tribal court jurisdiction is hardly sufficient to constitute Congressional authorization for all tribal courts to claim full territorial sovereignty. Indeed, as demonstrated in respondents' brief, the full legislative history shows that Congress was well aware of the existence of a dispute over the extent of tribal court jurisdiction and did not purport to resolve that dispute. Furthermore, it should be noted that in other contexts Congress has *reduced* the authority of tribal courts, limiting the punishment they can impose on members to one year in prison and a \$5,000 fine. 25 U.S.C. § 1302(7). It seems unlikely that Congress intended to restrict criminal jurisdiction over members of the tribe to such relatively small penalties, but at the same time intended to allow tribal courts virtually unlimited discretion to impose huge penalties on non-Indians through the assertion of civil tort jurisdiction.

IV. The Serious Due Process Problems Raised By Allowing Tribal Courts To Assert Jurisdiction Over Tort Claims Against Non-Indians Counsel Against A Broad Expansion Of Tribal Court Jurisdiction.

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that tribal courts did not have the power to exercise criminal jurisdiction over Indians who were not members of the tribe. Although Congress subsequently conferred such jurisdiction, the reasoning in *Duro* continues to apply to situations where Congress has not acted. In *Duro*, the Court emphasized the insular nature of tribal courts, noting that they were "influenced by the unique customs, languages and usages of the tribes they serve"; that tribal courts are "'often subordinate to the political branches of tribal governments'"; and that their "legal methods may depend on 'unspoken practices and norms.'" 495 U.S. at 693 (citations omitted). In light of these facts and the limited procedural protections available to criminal defendants in a tribal court, this Court concluded that only members of the tribe, who had a right to participate in tribal government, were subject to the criminal jurisdiction of the tribal courts.

The same concerns apply to tort claims against non-Indians. Non-Indians by definition cannot participate in tribal government. They may also be precluded from participating on juries. Although nearly half of the people who live on the Fort Berthold Reservation are not members of the Tribes, the tribal code limits participation on juries to members. See Tribal Code, Ch.2, § 8(c). Such provisions are not uncommon¹⁸—in spite of the fact that exclusion of non-Indians in

¹⁸ That was the case in the Crow Tribal Court proceeding where \$250 million in damages was assessed against BN. See also *Oliphant*, 435 U.S. at 194 & n.4.

any other court in this country would clearly constitute an equal protection violation. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-19, 629 (1991); *United States v. Bedonie*, 913 F.2d 782, 795 (10th Cir. 1990), cert. denied, 501 U.S. 1253 (1991).

It has long been recognized that local juries are likely to harbor prejudices against outsiders. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Indeed, that is the reason why the federal courts have diversity jurisdiction. Given the small size and insular nature of many reservations, the risk of local bias is particularly acute. Indeed, in many cases it may be virtually impossible to impanel a jury that does not include friends or relatives of the plaintiffs. That was BN's experience in the *Red Wolf* case, where fully one-third of the 65 venire members were friends or relatives of the plaintiffs. Fearful of running out of prospective jurors, the tribal court refused to grant BN's challenges for cause of a number of relatives, resulting in a jury that included relatives of the plaintiffs.

Even if a defendant succeeds in keeping the plaintiffs' friends and relatives off the jury, in a small reservation community there may be strong local biases that preclude an outsider from receiving a fair trial. Again, in the *Red Wolf* case, there were strong sentiments expressed against the railroad during the jury selection process. In *Wilson v. Marchington*, discussed above, strong biases were expressed against truckers who use the interstates running through the reservation.¹⁹ It may well be impossible for even the most conscientious tribal court to protect a non-Indian from such

¹⁹ One prospective juror suggested that he would like to see all motor carriers forced off the reservation, stating that "if I had my way, I'd abandon all the trucks on the reservation."

biases: unlike state courts, tribal courts cannot offer a change of venue to ensure fairness.

Other, more subtle biases may also contribute to an "us-vs-them" mentality, making it difficult for any juror to go against the community by ruling against an Indian plaintiff (or, as in this case, a long-time resident of the reservation) in favor of a non-Indian defendant. Because judges are often under the political control of the tribe, they too may be subject to pressure to rule against outsiders. This situation is anathema to "our system of law [which] has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("justice must satisfy the appearance of justice").

In addition to the risk of biased decision-making, a non-Indian defendant faces a daunting task simply trying to determine what law is likely to be applied to the claims made against him. In many cases, there may be no guidance available, since many tribal courts have yet to develop a body of common law precedents, applying instead the tribe's own unwritten laws and customs.²⁰ While it makes perfect sense to use tribal courts to resolve disputes involving members of the tribe, who can be expected to know these laws and customs, subjecting a non-Indian to unknown and unknowable legal standards constitutes a deprivation of the right to due process.

²⁰ This was a continuing problem throughout BN's *Red Wolf* case. The tribal judge, who was neither a member of the tribe nor an Indian, said at one point that he would apply the English common law. After being informed that wrongful death actions were not recognized at common law, the judge changed course, stating that he was applying principles of Crow law, even though there is no written Crow law dealing with the tort of wrongful death.

The inherent difficulty in allowing tribal courts to adjudicate claims against non-Indians is further exacerbated by the absence of any clear constraints to ensure fairness in the tribal courts. An "outsider" sued in state court is protected by the ability to remove the case to federal court and by the availability of direct review of federal constitutional claims in this Court. By contrast, there is no removal jurisdiction with respect to cases brought in tribal courts. There is also no direct review of tribal appellate court judgments in this Court to ensure that federal constitutional rights are respected.

In fact, as unwilling defendants in a tribal court, non-Indians may not have any constitutional rights at all. Congress enacted the Indian Civil Rights Act of 1968 to protect the rights of all litigants who appear in tribal courts. But in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court held that there is no private right of action to enforce the ICRA and that the plaintiff was required to bring her equal protection challenge to tribal membership requirements in tribal court. The proponents of broad tribal court jurisdiction take the position that *Santa Clara Pueblo* precludes non-Indian litigants from challenging a tribal court judgment in federal court on the ground that it was secured in violation of the ICRA. While we disagree with that interpretation, the extent of review available to non-Indian litigants outside the tribal court system—and therefore the existence of any constraint to abide by fundamental principles of fairness—remains far from clear.²¹

²¹ Litigants may have an opportunity to challenge the fairness of tribal court judgments if and when the tribal court plaintiff seeks to enforce the judgment against assets located outside the reservation. However, tribal court proponents once again take the position that the review available is extremely limited and that tribal court judgments are entitled to the same full faith and credit as state court judgments.

The federal policy of fostering tribal self-government is served by the development of tribal court systems to resolve *intra-tribal* disputes. But that policy does not require the federal courts to bless the kind of injustice likely to result when tribal courts assert jurisdiction over tort claims against non-Indians involved in accidents on federal rights-of-way.

V. This Court Should Act To Resolve The Uncertainty Surrounding Tribal Court Jurisdiction.

The lack of any clear rules for judging the extent of tribal court jurisdiction, when combined with the tribal court exhaustion rule first announced in *National Farmers Union*, has created a quagmire for litigants on both sides of a dispute arising out of an accident on the reservation. As this very case illustrates, disputes over the appropriate forum can consume years of expensive litigation. That hurts not only defendants, but also plaintiffs who seek a prompt resolution of meritorious claims.²²

Although petitioners and their amici contend that they are seeking only "concurrent" jurisdiction over tort claims on the reservation, the exhaustion rule has been applied so broadly in the lower courts that there is no such thing: if an accident occurred on a reservation, the litigants are likely to be forced, willing or not, to sue "first" on the reservation to let the tribal court decide whether it has jurisdiction. Thus, even Indian plaintiffs who would prefer to litigate in another

²² Plaintiffs whose claims are weak or even frivolous may choose to sue or threaten to sue in tribal court in order to gain a "home court" advantage that, at the very least, might persuade the defendant to pay a substantial settlement. Indeed, this very case appears to fall into that category. The liability facts seem weak, and the claims of Mrs. Fredericks' children to over \$1 million for loss of parental consortium (J.A. 9) are claims that would not survive a motion to dismiss in a North Dakota state court. See *Butz v. World Wide, Inc.*, 492 N.W.2d 88 (N.D. 1992) (refusing to recognize a child's claim for loss of parental consortium).

forum—and thus avoid the necessity of enforcing a tribal court judgment outside the reservation—have found the doors of the federal courts closed to them, on the ground that they are required to bring their claims first in tribal court. *See, e.g., Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987).

This is a situation that cries out for clear, bright-line rules. For all of the reasons outlined above, tribal courts should not be allowed to assert jurisdiction over non-Indians in cases arising out of accidents on federally-granted rights-of-way absent their explicit consent or express congressional authorization.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a nonmember plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state highway within the reservation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICI CURIAE</i>	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. TRIBAL COURT JURISDICTION EXTENDS ONLY TO MATTERS HAVING A DIRECT EFFECT ON TRIBAL INTERESTS	5
A. Indian Tribes Do Not Possess Plenary Sovereign Powers, But Rather Retain Only A "Unique and Limited" Sovereignty That Focuses On Tribal Matters	5
B. The Limited, Dependent Sovereignty Of Indian Tribes Is Not Based On Territoriality—	7
C. Tribal Courts Can Have No "Adjudicatory" Jurisdiction Where The Tribes' "Unique and Limited" Sovereignty Does Not Apply	12
II. THIS TORT SUIT NEITHER ARISES OUT OF A "CONSENSUAL RELATIONSHIP" BETWEEN THE TRIBE AND NONMEMBERS NOR DIRECTLY IMPLICATES TRIBAL INTERESTS AND, THEREFORE, IS NOT SUBJECT TO TRIBAL COURT JURISDICTION....	18
A. This Suit Did Not Arise Out Of The Tribe's Consensual Relations With Nonmembers.....	18
B. The Facts Underlying This Suit Do Not Threaten The Political Integrity, Economic Security, Health Or Welfare Of The Tribe....	21
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
<i>Babcock v. Johnson</i> , 191 N.E.2d 279 (N.Y. 1963) ..	22
<i>Backcountry Against Dumps v. Environmental Protection Agency</i> , — F.3d —, 1996 WL 621924 (D.C. Cir. Oct. 29, 1996)	8
<i>Bradford Elec. Light Co. v. Clapper</i> , 286 U.S. 145 (1932)	16
<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1989)	9, 20, 21
<i>Burnham v. Superior Court</i> , 495 U.S. 604 (1990) ..	8
<i>Devils Lake Sioux Tribe v. North Dakota Pub. Serv. Comm'n</i> , 896 F. Supp. 955 (D.N.D. 1995) ..	18-19
<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	8
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	14
<i>Fisher v. District Court</i> , 424 U.S. 382 (1976)	10, 13
<i>Fletcher v. Peck</i> , 10 U.S. (6 Cranch) 87 (1810) ..	3, 5, 8
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	passim
<i>Johnson v. McIntosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	3, 5
<i>Lewis County v. Allen</i> , No. 93-0382-N-HLR (D. Idaho August 18, 1994)	16-17
<i>Montana v. Gilham</i> , 932 F. Supp. 1215 (D. Mont. 1996)	2, 17
<i>Montana v. United States</i> , 450 U.S. 544 (1981) ..	passim
<i>National Farmers Union Ins. Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	2, 9, 11, 14
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	16
<i>Nevada v. Hicks</i> , No. CV-N-94-351-DWH, 1996 Westlaw 600865 (D. Nev. Sept. 30, 1996)	2, 17
<i>Oliphant v. Schlie</i> , 544 F.2d 1007 (9th Cir. 1976) ..	9
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	passim
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	15
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	14, 15
<i>Schultz v. Boy Scouts of America, Inc.</i> , 480 N.E.2d 679 (N.Y. 1985)	22

TABLE OF AUTHORITIES—Continued

	Page
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993) ..	9, 11, 12
<i>Tarble's Case</i> , 80 U.S. (13 Wall.) 397 (1872)	16
<i>Testa v. Katt</i> , 330 U.S. 386 (1947)	15
<i>Three Affiliated Tribes v. Wold Engineering</i> , 476 U.S. 877 (1986)	13, 14
<i>United States v. Kagama</i> , 118 U.S. 375 (1886)	6
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	10
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978) ..	6, 9, 10, 12
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	10
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	12, 12-13
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996)	2
Statutes and Treaties	
Act of June 2, 1924, 8 U.S.C. § 1401	13
General Allotment Act, 25 U.S.C. §§ 331 <i>et seq.</i>	11
Indian Civil Rights Act, 25 U.S.C. § 1302	14
Treaty of Fort Laramie, 15 Stat. 635 (1868)	
28 U.S.C. § 1332	10
28 U.S.C. § 1652	14
Other Authorities	
William F. Baxter, <i>Choice of Law and the Federal System</i> , 16 Stan. L. Rev. 1 (1963)	22
L. Scott Gould, <i>The Consent Paradigm: Tribal Sovereignty At The Millennium</i> , 96 Colum. L. Rev. 809 (1996)	8

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IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. Many of *amici*'s members exercise civil and regulatory authority in areas in and near the reservations of Indian tribes. Indeed, it is not uncommon that large numbers of non-Indians reside within reservation boundaries, *see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978), and that States and local governments have built and maintain highways, schools and other facilities within reservation boundaries. *See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

The scope of tribal civil jurisdiction over nonmembers is of concern to *amici* for several reasons. First, it affects substantial rights of citizens and entities who are not members of the tribal community. In addition, States and local governments and their officials have found themselves, with increasing frequency, defendants in civil actions brought in tribal court to challenge a wide range of exercises of state authority. *See, e.g., Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (county tax challenged by tribal member in tribal court); *Montana v. Gilham*, 932 F.Supp. 1215 (D. Mont. 1996) (tribal court negligence action against State for failure to maintain state highway within reservation), *appeal docketed*, No. 96-35766 (9th Cir. July 18, 1996); *Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 WL 600865 (D. Nev. Sept. 30, 1996) (State and state officials sued in tribal court for constitutional and other torts).

To the extent tribal courts assert jurisdiction over such suits, these cases raise a host of issues protracting the disputes and increasing the costs of their resolution. The determination of whether tribal court jurisdiction exists in this case thus has important implications for the law governing a wide range of non-tribal activity occurring within reservations.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.¹

SUMMARY OF ARGUMENT

This case has its foundation in the nature of the sovereignty exercised by Indian tribes. Consistently, from very early cases decided by this Court, Indian tribes have been adjudged to have an inherent retained sovereignty of a unique, dependent, and limited character. By contrast, the federal government and States have been acknowledged to possess a sovereignty that is plenary and unlimited. The difference in the nature and character of these two types of coexisting sovereignties, that of Indian tribes on the one hand, and that of the federal government and States on the other, has been critically important in cases beginning with *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), both of which addressed title to land, through *Montana v. United States*, 450 U.S. 544 (1981), holding that the Crow Tribe lacked power to regulate hunting and fishing on lands held in fee by persons who were not members of the Tribe.

The limited and dependent inherent sovereignty exercised by Indian tribes is based primarily on tribal membership and has a limited territorial aspect that is not sufficient by itself to confer jurisdiction over nonmembers. Of course, this limited sovereignty may be supplemented or diminished by specific acts of Congress.

Montana crystallizes these judicial precepts into "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S. at 565, and the correla-

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

tive basic rule that tribes may exercise that power which "is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. Two exceptions to that rule allow tribal regulation of "nonmembers who enter consensual relationships with the tribe or its members" and of conduct by nonmembers that "threatens" or has some "direct effect" on the political integrity or welfare of the tribe. *Id.* at 565-66. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987), does not establish any rule contrary to *Montana*, because *Iowa Mutual* acknowledges that tribes possess only "attributes of sovereignty" as contrasted to the plenary sovereign power of a State or the federal government.

This case tests the boundaries of the *Montana* rule. It focuses on tort claims brought in tribal court by a nonmember plaintiff against a nonmember contractor arising out of an auto accident on a state highway traversing land within the reservation of the Three Affiliated Tribes. The court of appeals correctly ruled that the tribal court did not have power to adjudicate the civil claims of nonmembers of the tribe based merely on territoriality, *i.e.*, the fact that the accident occurred within the boundaries of the reservation.

Petitioners and the United States have suggested that tribal courts may have an "adjudicatory" jurisdiction where the tribes' limited sovereignty does not apply, but there is no basis for such a position. This Court has carefully avoided any recognition of a concurrent jurisdiction of tribal courts with either federal or state courts. Among other things, tribal courts are not bound by the Supremacy Clause, the Full Faith and Credit Clause, or the Rules of Decision Act, and review of tribal court decisions is not available in federal or state court to test application of the Due Process Clause. Also, "adjudicatory" jurisdiction necessarily does have a "regulatory" content, as illustrated by the obligation to determine tort law in this case.

Neither do the *Montana* exceptions provide a basis for tribal court jurisdiction. Traveling on a state highway within a reservation does not trigger the "consensual relationship" prong of *Montana*—simply using a state highway is not sufficient. And although the respondent contractor had a contract with a tribal entity, basing tribal jurisdiction on an attenuated *but for* causation arising from the contractor's travel on the highway would sweep into tribal court any cause of action based on the contractor's mere presence. Similarly, the facts do not threaten or directly affect the political integrity or welfare of the tribe. There is not a "direct effect" on the tribe within the meaning of the *Montana* exceptions. In this respect, and others, the decision in this case will have important implications for current and future recreational and commercial activity involving nonmembers occurring within and around tribal reservations and enclaves.

ARGUMENT

I. TRIBAL COURT JURISDICTION EXTENDS ONLY TO MATTERS HAVING A DIRECT EFFECT ON TRIBAL INTERESTS

A. Indian Tribes Do Not Possess Plenary Sovereign Powers, But Rather Retain Only A "Unique and Limited" Sovereignty That Focuses On Tribal Matters

Since the early nineteenth century, this Court has consistently held that Indian tribes do not retain sovereignty of the kind possessed and exercised by the state and federal political entities which form the Union. *See Montana v. United States*, 450 U.S. 544, 563-65 (1981); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810) (Marshall, C.J.); *id.* at 143, 146-47 (Johnson, J., concurring). Plenary sovereign power did inhere at one time in the aboriginal Indian nations that inhabited the territory

of what is now the United States. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) ("Before the coming of the Europeans, the tribes were self-governing political communities."). But the tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *Id.* at 323. The sovereign power remaining after the tribes' incorporation into the United States "is of a unique and limited character." *Id.* Thus, in *Wheeler* the Court ruled that the Double Jeopardy Clause of the Fifth Amendment did not bar a federal prosecution of an Indian who previously had pleaded guilty to a lesser crime in tribal court, because the United States and the tribe were different sovereigns, albeit not of the same type.

The dependent and limited nature of tribal sovereignty was also the basis for decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which this Court ruled that tribal criminal powers do not extend to non-Indians. In *Oliphant*, a case decided contemporaneously with *Wheeler*, the Court reaffirmed that within the geographical limits of the United States,

"[t]he soil and peoples . . . are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two."

435 U.S. at 211 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)). Thus, tribes could not exercise criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208.

Thereafter, in *Montana*, this Court ruled that the attributes of the "unique and limited" sovereignty of an Indian tribe are defined by the tribe's requirements for internal governance; i.e., regulation of the tribe as a whole and the relations among its members. As to matters external to the tribe and its members, the Court, drawing on

a long line of precedent, articulated "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. As this Court stated in *Montana*:

[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

450 U.S. at 564 (citation omitted).

Montana goes on to set forth two categories of cases in which the exercise of tribal sovereignty is not "inconsistent with the dependent status of the tribes":

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

B. The Limited, Dependent Sovereignty Of Indian Tribes Is Not Based On Territoriality

As defined and expounded in *Wheeler*, *Oliphant*, and *Montana*, the limited sovereignty of an Indian tribe is not based on territory. Rather, it is based primarily on tribal membership and has a limited territorial aspect that is not sufficient by itself to confer jurisdiction over nonmembers.

By contrast, the sovereignty exercised by a State, both in theory and in fact, traditionally includes "the power to hale before its courts any individual who could be found within its borders," and to "retain jurisdiction to enter judgment against him, no matter how fleeting his visit." *Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990) (plurality opinion).

Territorial jurisdiction is the mark of an unlimited, broad sovereignty, not that of a limited, dependent one. As this Court noted in *Oliphant*, the limited sovereignty exercised by the Indian tribes addresses members and no longer includes "the right of governing every person within their limits." *Oliphant*, 435 U.S. at 209 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring)). Such a "basic attribute" of unlimited sovereignty—"the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens"—is inconsistent with the tribes' dependent status. *Duro v. Reina*, 495 U.S. 676, 685 (1990).

Thus, it is emphatically not the law of this Court that, "[i]n the absence of a contrary treaty or Act of Congress, an Indian Tribe retains plenary sovereign authority, both legislative and adjudicatory, over all Indian and non-Indian activities on tribal lands." U.S. Br. 24.² And,

² The United States addresses tribal sovereignty in comparative terms—equating tribal authority to that of a State. See U.S. Br. 20. This equation runs directly counter to this Court's jurisprudence, including especially *Kagama* and its explicit holding that in the United States only the federal government and States exercise unlimited sovereignty, and Indian tribes do not. See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty At The Millennium*, 96 Colum. L. Rev. 809, 827-28 (1996).

Of course, Congress by statute may for some purposes assign tribes a role under federal legislation that is roughly equivalent to that of a State, but it must do so explicitly. See *Backcountry Against Dumps v. Environmental Protection Agency*, — F.3d —, 1996 WL 621924 (D.C. Cir. Oct. 29, 1996) (Resource Conservation and Recovery Act defines Indian tribes as municipalities, not States, and EPA action approving solid waste permitting plan

similarly, it is not the law that "[a]bsent congressional divestment, a tribe's inherent sovereignty extends to both its members and its territory." Pet. Br. 9. On the contrary, "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express Congressional delegation,' and is therefore *not* inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (quoting *Montana*, 450 U.S. at 564). As this Court emphasized in *Oliphant*, "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments"; instead, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers 'inconsistent with their status.'" 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)); see also *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 n.14 (1985) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.") (quoting *Wheeler*, 435 U.S. at 323).

In sum, an Indian tribe has no "plenary" or "inherent" sovereign authority over a nonmember other than the limited authority consistent with the doctrine of *Montana*. The tribes may retain "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," but only in matters involving "consensual relationships with the tribe" or having a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. Even with respect to activities occurring within the confines of a reservation, therefore, exercise of jurisdiction by an Indian tribe over nonmembers requires first that a compelling tribal interest be identified under *Montana*. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (addressing

submitted by Campo Band of Mission Indians was invalid because only States may submit such permitting plans for Agency approval).

inconsistent county and tribal zoning regulations with relation to land owned in fee by non-Indians located within the boundaries of a reservation).

The Court's dictum in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), on which both the petitioners and the United States heavily rely, Pet. Br. i, 13, 15, 20; U.S. Br. 13, 17-19, 24, must be understood in light of this Court's consistent rule—adhered to both before and after *Iowa Mutual*—that the Indian tribes possess only a “unique and limited” sovereignty. *Wheeler*, 435 U.S. at 323. In *Iowa Mutual*, the Court held that in a dispute between a member of an Indian tribe and a non-Indian as to which the member has sought relief in tribal court, a federal court having jurisdiction under the diversity statute, 28 U.S.C. § 1332, should nonetheless forbear to exercise such jurisdiction pending the tribal court's assessment of its own jurisdiction. See 480 U.S. at 11-20.

Precisely because the relevant facts and issues as to the tribal court's jurisdiction were not before the Court, the Court announced no new principle in *Iowa Mutual* respecting the limits of tribal jurisdiction. While stressing the “federal policy favoring tribal self-government” to urge deference to tribal jurisdiction assuming it existed, 480 U.S. at 14, *Iowa Mutual* acknowledged that the tribes possess only “attributes of sovereignty,” as opposed to the full sovereign power of a State or the federal government. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Indeed, the Court cited and relied on the very portion of *Montana* that limits tribal jurisdiction over the activities of nonmembers to two discrete classes of cases:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-389 (1976). Civil jurisdiction over such activities presumptively lies in the tribal courts unless

affirmatively limited by a specific treaty provision or federal statute.

480 U.S. at 18.

In context, the “tribal sovereignty” to which the Court refers in the quoted passage is only that residuum of “retain[ed] elements of ‘quasi-sovereign’ authority,” *Oliphant*, 435 U.S. at 208, not extinguished with the tribes' aboriginal sovereignty by their incorporation into the territory of the United States. Thus, there is no “*Iowa Mutual* rule” (Pet. Br. 15) acknowledging any tribal sovereignty other than those “aspects of sovereignty” not generally divested “by implication as a necessary result of [the tribes'] dependent status.” *National Farmers Union Ins. Cos.*, 471 U.S. at 853 n.14.⁸ Not only in *Montana*, but in an un-

⁸ Nor, contrary to petitioners' suggestion (Pet. Br. 18), is there any “*Montana* rule” that links divestiture of tribal sovereignty over the activities of nonmembers to occupancy by such nonmembers of land alienated from the tribe. The *Montana* Court's consideration of the General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, was entirely separate from its discussion of “inherent sovereignty” of the tribes. Compare *Montana*, 450 U.S. at 559-61, with *id.* at 563-66. The tribe in *Montana* contended that Congress had created general tribal sovereignty over the territory of the reservation in question—and, by implication, incidental power to regulate fishing and hunting in such territory—under the 1868 Treaty of Fort Laramie, 15 Stat. 635, which granted the tribe “absolute and undisturbed use and occupation” of the reservation land. The Court held, however, that by authorizing alienation of reservation land to non-Indians under the General Allotment Act, Congress had abrogated any regulatory power that might otherwise exist under the Treaty. 450 U.S. at 559.

The same rule was followed in *Bourland*, in which the Court addressed whether the Cheyenne Sioux Tribe had authority to regulate hunting and fishing in an area adjacent to the Missouri River in which the federal government had developed a dam and flood control project. Construing treaty language identical to that in *Montana*, the Court held that “Congress ha[d] abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project.” *Bourland*, 508 U.S. at 687 (emphasis added). The Court went on to state that unless one of the exceptions set

broken line of precedents including *Oliphant*, *Wheeler*, *National Farmers Union Ins. Cos.*, *Bourland*, and *Brendale*, the Court has recognized tribal sovereignty only "to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations." *Bourland*, 508 U.S. at 694 (citing *Wheeler*, 435 U.S. at 326). The Court should not depart from that long-maintained rule here: the asserted jurisdiction of the Fort Berthold tribal court can be exercised only if it is consistent with the "unique and limited" sovereignty of the tribes, as delineated in *Montana*.

C. Tribal Courts Can Have No "Adjudicatory" Jurisdiction Where The Tribes' "Unique and Limited" Sovereignty Does Not Apply

The suggestion of the petitioners and the United States that a tribal court may exercise a separate "adjudicatory" jurisdiction over matters as to which the tribe has no sovereignty, Pet. Br. 22-26, U.S. Br. 15-24, lacks any basis in this Court's precedents and cannot withstand scrutiny. Consistent with the limited character of tribal sovereignty as contrasted to that of the federal and state sovereigns, the Court has assiduously avoided recognizing concurrent jurisdiction of tribal courts on the one hand, and federal or state courts on the other. For example, in *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that a state court could not exercise jurisdiction—presumably concurrent with that of the tribal court—over a suit in contract brought by a non-Indian plaintiff against an Indian defendant. Refusing to recognize concurrent state and tribal court jurisdiction, the Court held that "to allow the exer-

forth in *Montana* was applicable, "[g]eneral principles of 'inherent sovereignty' also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area." *Id.* at 694.

Thus, in both *Montana* and *Bourland*, the "tribal sovereignty" as to which the Court found a "divestment" by Congress (Pet. Br. 16) was not an inherent sovereignty but one that had been created by Congress through the Treaty of Fort Laramie.

cise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. Similarly, in *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976) (per curiam), the Court rejected the possibility of "subject[ing] a dispute arising on the reservation among Indians to a forum other than the one they have established for themselves" on the ground that it "plainly would interfere with the powers of self-government" of the tribe.⁴

The Court has likewise precluded the federal courts from exercising jurisdiction concurrent with that of the Indian tribes. In *Iowa Mutual*, the federal court apparently had proper diversity jurisdiction in a suit between the insurance company, a citizen of Iowa, and the defendant member of an Indian tribe who resided on a reservation located in Montana. *See* 480 U.S. at 17-18 n.10 (after passage of Act of June 2, 1924, "under the Fourteenth Amendment, Indians are citizens of the States in which they reside"). Nonetheless, the Court rejected the possibility of concurrent jurisdiction:

In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

⁴ In inviting the Court to consider the prospect of concurrent jurisdiction, the United States comments that "[c]oncurrent jurisdiction is common in many contexts." U.S. Br. 17 n.10. The only case cited involving Indian courts is *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). That case recognized jurisdiction by state courts of North Dakota over a suit brought by the Three Affiliated Tribes. *See also infra*, n.5.

480 U.S. at 16 (citations omitted); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (despite federal claim under Indian Civil Rights Act, 25 U.S.C. § 1302, federal court has no jurisdiction over claim against tribal official other than writ of habeas corpus).

The Court's careful efforts to demarcate and separate the jurisdiction of tribal courts from that of the state and federal courts recognize that "adjudicatory" jurisdiction inevitably implicates questions of regulatory power and, ultimately, sovereignty. The most immediate example in this regard is raised by the prospect of execution of judgments. Issues of sovereignty were plainly raised, for example, by a tribe's seizure of property of a defendant state school district pursuant to the tribal court's writ of execution after judgment obtained in tribal court. See *National Farmers Union Ins. Co.*, 471 U.S. at 849 n.4.⁶ Even outside the context of execution of judgments, however, this Court's cases have demonstrated time and again that the application and development by one sovereign's court of another sovereign's law raises questions as to the limitations on the first sovereign's power.

Thus, the federal courts are constrained by the Rules of Decision Act to apply state laws as rules of decision "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652. Notoriously, however, the practice of the federal courts prior to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938), "invaded rights which . . . are reserved by the Constitution to the several states." Similarly, States are constrained by the Supremacy Clause to

⁶ Notably, in *Three Affiliated Tribes v. Wold Engineering*, the Court recognized jurisdiction of the state courts of North Dakota over a suit by the tribe against a non-Indian defendant, in part because "even if the Tribe were to have access to tribal court to resolve civil controversies with non-Indians, it would be unable to enforce these judgments in state court." 476 U.S. at 889.

honor federal causes of action to the extent they recognize analogous state law claims. See *Testa v. Katt*, 330 U.S. 386 (1947). And a state court's choice of its own law, in the absence of sufficient contacts between that State and the dispute before the court, may impermissibly "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

As between the state and federal sovereigns and among the several States, the Supremacy Clause, Full Faith and Credit Clause, Due Process Clause, and the Rules of Decision Act afford a framework for avoiding and resolving conflicts of sovereignty. But to the extent of a tribe's sovereignty, these fundamental precepts either do not apply in tribal court or cannot be enforced through review in state courts, or especially in the case of the Due Process Clause, federal courts. See *Santa Clara Pueblo*, 436 U.S. at 56. The resulting prospect that tribal court adjudication of disputes governed by state law will create conflicts with state regulatory powers counsels that tribal jurisdiction extend only to matters directly affecting tribal interests cognizable under *Montana*.

One especially important example of the conflict of laws problems raised by the possibility of concurrent state and tribal court jurisdiction involves the status in tribal courts of a state or local government's defense of sovereign immunity. State and local governments and their employees frequently work in and around reservation areas, both with members of the tribe and with nonmembers. A State's policies respecting the defense of sovereign immunity reflect a careful balance between the need to compensate those injured in connection with a State's activities and the public's interest in limiting the liabilities associated with governmental functions. A tribal court exercising

concurrent "adjudicatory" jurisdiction over an action against a state defendant might conclude that it is not required to respect that same balance of policies. This would be an incongruous result in a matter as to which it is assumed the tribe would have no sovereign "regulatory" power under *Montana*.

To be sure, a state government also cannot ensure that its sovereign immunity will be recognized in another State's courts. *Nevada v. Hall*, 440 U.S. 410 (1979). The *Hall* rule, however, follows from the principle that because the States are coequal sovereigns within the Union, there is no reason to conclude "that any one State's immunity from suit in the courts of another State is anything other than a matter of comity." 440 U.S. at 425. This approach is not warranted with respect to tribal sovereignty, which is neither plenary nor territorial, absent a protectable tribal interest under *Montana*.⁶ Moreover, in a circumstance analogous to the present case—where the plaintiff is not a citizen of the State whose courts are exercising jurisdiction—the recognition of the defendant State's sovereign immunity defense should be required by the Full Faith and Credit Clause. *Cf. Hall*, 440 U.S. at 421-24 (discussing rule of *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932)). There is no assurance that such a constraint will be honored by tribal courts.

Conflicts between tribal law and state law as to sovereign immunity may thus arise in a suit by a tribal member against a State or local government in which tribal jurisdiction would otherwise exist under *Montana*. Compare, e.g., *Lewis County v. Allen*, No. 93-0382-N-HLR

⁶ Similarly, even though state courts generally exercise concurrent jurisdiction with the federal courts in applying federal law, the distinct powers of sovereignty exercised by the States and the federal government bar a state court from exercising jurisdiction over an action in habeas corpus against a defendant federal official. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

(D. Idaho Aug. 18, 1994) (tribal court has no jurisdiction over tort action by tribal member against county sheriff and other county officials); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996) (state sovereign immunity barred tribal court jurisdiction over negligent design action by the estate of a tribal member against state highway authority arising out of traffic accident occurring on reservation land), with *Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 Westlaw 600865, at *11 (D. Nev. Sept. 30, 1996) (tribal court had jurisdiction over tort claim against state game wardens; district court expressed no opinion as to "whether qualified immunity is available to the state defendants as a defense"). In circumstances such as the present, however, the potential for disparate treatment of state sovereign immunity counsels even more forcefully against the recognition of concurrent jurisdiction in state and tribal courts.

Indeed, ultimately both petitioner and the United States concede that "adjudicatory" jurisdiction exerts a "regulatory" force. Within a few pages of arguing that the tribe seeks only "adjudicatory," as opposed to "regulatory" jurisdiction, for example, the United States asserts that the tribe has an interest in "deter[ring] and remedy[ing] dangerous vehicular conduct through adjudication of civil disputes." U.S. Br. 24, 28. Similarly, the petitioners defend the Tribe's "sovereign right to determine the law of torts on the Reservation." Pet. Br. 29. Thus, "adjudicatory" jurisdiction necessarily does have a "regulatory" content, and one cannot be divorced from the other.

In this vein, *Montana* dictates against such an expansion of the tribes' sovereign powers through "adjudicatory" means. Just as *Williams v. Lee* held that state adjudication of primarily tribal matters would interfere with tribal sovereignty, the Tribe's assertion of jurisdiction in the absence of the requisite tribal interest under *Montana* both exceeds the limits of the "unique and limited" sov-

ereignty possessed by the Tribe and, *pro tanto*, interferes with the jurisdiction of the state and federal courts. Whether it is labeled "adjudicatory" or "regulatory," therefore, any "sovereign right" to be exercised over nonmembers of the Tribe must be justified under *Montana*.

II. THIS TORT SUIT NEITHER ARISES OUT OF A "CONSENSUAL RELATIONSHIP" BETWEEN THE TRIBE AND NONMEMBERS NOR DIRECTLY IMPLICATES TRIBAL INTERESTS AND, THEREFORE, IS NOT SUBJECT TO TRIBAL COURT JURISDICTION

In *Montana*, the Court set forth a two-part test to be used for determining whether a tribe's "inherent sovereign powers" permit the exercise of "civil jurisdiction over non-Indians on their reservation[]." 450 U.S. at 565. The *Montana* test limits tribal courts' jurisdiction over nonmembers to those situations in which the nonmember has entered into a consensual relationship with the tribe or has acted in a way that has some "direct" effect on tribal interests. *Id.* at 565-66. Neither of these prongs of the *Montana* test should be interpreted to permit tribal court jurisdiction in this case.

A. This Suit Did Not Arise Out Of The Tribe's Consensual Relations With Nonmembers

The "consensual relationship" prong of the *Montana* test must be read in the context of the rule to which it is an exception. That rule provides that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," *Montana*, 450 U.S. at 565, but rather encompass only "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. Part of "what is necessary" to protect tribal self-government is the power of self-determination, *i.e.*, the power to enter into consensual agreements with nonmember entities. *See, e.g., Devils Lake Sioux Tribe v.*

North Dakota Pub. Serv. Comm'n, 896 F. Supp. 955, 961 (D.N.D. 1995). This power includes the lesser power to determine the terms upon which the tribe will do business with nonmember entities. Recognizing this, the *Montana* Court held that tribes "may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 566. Thus, tribal court jurisdiction should extend over those activities which arise out of a consensual relationship or in some way implicate the tribe's interests in such a relationship. This interpretation honors both the rule, which limits tribal jurisdiction, and the exception, which safeguards remaining attributes of tribal sovereignty.

Under such an analysis, jurisdiction over this tort action does not lie in tribal courts. This lawsuit is wholly unrelated to A-1's contract with LCM Corporation ("LCM"). No part of that agreement is relevant to the plaintiffs' *prima facie* case or to respondents' defenses. Similarly, the Tribe's sovereignty over its affairs or those of its members is not jeopardized by the conclusion that the tribal court lacks jurisdiction.

By contrast, finding a "consensual relationship" in this case sufficient to permit tribal court jurisdiction would allow a *Montana* exception to swallow the *Montana* rule. It would also be unworkable as a practical matter because the requisite nexus would result in an arbitrary assertion of jurisdiction by tribal courts over cases such as this one. Even assuming that A-1's contract with LCM was a necessary cause of Lyle Stockert's presence on the reservation on the day of the accident, *but see* Pet. App. 3a n.1, to base tribal court jurisdiction on a *but for* explanation of Stockert's presence would sweep into tribal court any cause of action based on any of Stockert's actions on the particular day. Thus applied, the limited exception posited by *Montana* would override the general rule—"that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers." 450 U.S. at 565.

The "consensual relationship" prong of *Montana* would likewise be unduly expanded if this Court were to adopt the "reasonably foreseeable consequences" test advocated by petitioners. See Pet. Br. 28. What is needed in this area of the law is more, not less, certainty about the jurisdiction of tribal courts over nonmembers. See *Brendale*, 492 U.S. at 431 (plurality opinion).⁷ Because of the "checkerboard ownership" of many reservation lands, *id.* at 430, persons working within a reservation's boundary, whether on tribal land or not, inevitably will have reasonably foreseeable contacts and involvement with each of one or more States, the federal government, and the tribe. What *Montana* recognizes, however, is that such overlapping, incidental contacts cannot, either in theory or in function, serve as a basis for putting tribal sovereignty on a par with the police power of a sovereign State or the enumerated powers of the federal government. See *Brendale*, 492 U.S. at 429 (plurality opinion). The tribes must be sovereign in matters of core importance to the tribes, while the plenary sovereign power of the state or federal government, as appropriate, extends to all other matters, and is exclusive. Accordingly, nonmembers whose activities bring them into contact with the tribes benefit from a "bright-line" principle which subjects them to regulation by the tribes not merely where their conduct has some reasonably foreseeable effect on the tribe, but where the tribe's interest is "direct." See *Montana*, 450 U.S. at 566.

Outside this limited category of activities, as to which nonmembers of tribes cannot but have notice of the tribe's interests, *Montana* protects a nonmember's reasonable expectations that it must answer only to the state and

⁷ Economic development within reservation boundaries may be inhibited by a lack of certainty as to which law would apply. Those concerns would be ameliorated by focusing *Montana*'s consensual relationship exception on agreements between nonmembers and the tribe or tribal members respecting tribal lands or activities on such lands.

federal sovereigns. Thus, based on expectations, merely travelling on a state highway on or through a reservation would not trigger tribal jurisdiction. Similarly, travelling on a state highway on a reservation to visit a tribal-owned or sanctioned gambling casino would not by itself be sufficient to confer tribal jurisdiction.⁸ *Montana* does not embrace such attenuated but-for concepts. Instead, the consensual relationship prong should address alleged harmful actions directed toward either the relationship or the tribe's sovereign right to determine the terms of that relationship. Under the proper analysis, there is no tribal jurisdiction in this case under the first *Montana* exception.

B. The Facts Underlying This Suit Do Not Threaten The Political Integrity, Economic Security, Or Health Or Welfare Of The Tribe

The second *Montana* exception may provide a basis for tribal courts to exercise jurisdiction over nonmembers where the conduct of nonmembers "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁹ *Montana*, 450 U.S. at 566. The impact of an accident of the type at issue in this case on the "health or welfare of the tribe" falls well short of the "direct effect" that may be required by *Montana*.

⁸ *Amicus curiae* Shakopee Mdewakanton Sioux (Dakota) Community reportedly "operates a casino with a high volume of non-member visitors" near the Twin Cities in Minnesota. Br. Am. Cur. Shakopee Mdewakanton Sioux (Dakota) Community, *et al.*, at 1. Similarly, *amicus curiae* Yavapai-Apache Nation operates the "Cliff Castle Casino and Montezuma Visitors' Center" on a reservation parcel located in northern Arizona. Br. Am. Cur. Yavapai-Apache Nation, *et al.*, at 3.

⁹ Indeed, as construed in *Brendale*, the "direct effect" prong of *Montana* may not afford any basis for tribal authority over nonmembers. See Br. Am. Cur. States of Montana *et al.*, at 24-29, discussing *Brendale*, 492 U.S. at 428-31 (plurality opinion).

No member of the Tribe was involved in this accident; its immediate impacts were visited on citizens of the State of North Dakota. Ordinary interest analysis-based choice of law precepts would therefore dictate application of North Dakota law, on the ground that the Tribe has no interest in the outcome of a lawsuit between two nonmembers. See *Babcock v. Johnson*, 191 N.E.2d 279 (N.Y. 1963) (in suit between New York residents for injuries resulting from auto accident occurring in Ontario, New York court will not apply Ontario guest statute to bar recovery); *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985) (in suit between New Jersey domiciliaries for injuries inflicted in New York, New York court will apply New Jersey charitable immunity doctrine).

Nor is the exercise of jurisdiction by the Tribe necessary to protect an indirect interest in requiring that persons driving on the reservation use due care. That interest is sufficiently advanced by a tribal jurisdiction which is limited to disputes involving harm to tribal members, because, *ex ante*, no visitor to the reservation would know whether the potential victim of his or her tortious conduct would be a tribal member. See William F. Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 13 (1963) (in an accident between two residents of "State Y" occurring in "State X," loss-distributing laws of "State Y" should be applied; "State X" 's regulatory interest is not impaired because "[c]onduct on X highways will not be affected by knowledge of Y residents that the X [law] will not be applied to them if the person they injure happens to be a co-citizen").

Indeed, in arguing that the Tribe has "adjudicatory" jurisdiction separate from its "regulatory" powers, both the petitioners and the United States admit that the Tribe's interest in this case is sufficiently attenuated that the Tribe might simply apply North Dakota law. Pet. Br. 25-26; U.S. Br. 20-22. Such an approach, however, cannot be reconciled with the assertion that the case concerns a mat-

ter which has "some direct effect" on the "health or welfare of the tribe." *Montana*, 450 U.S. at 566.¹⁰ Thus, neither the Tribe's existence, nor basic aspects of its retained sovereignty—such as the right to determine membership and govern internal affairs—are at stake. This is a personal injury tort suit between two nonmembers that should be decided under North Dakota law in a state court.¹¹

The existence of highly qualified tribal courts is something in which the Tribe should take pride and for which those who aided their development should be commended. The qualifications of a court, however, do not justify expanding its jurisdiction. Rather, the scope and power of a tribal court is determined by the nature and breadth of tribal interests, as explicated in *Montana*. Such interests are not implicated in a dispute between two citizens of the State of North Dakota. In the absence of tribal interests, this Court should not supplant state authority by providing for tribal court jurisdiction over this personal injury case between nonmember citizens of the State of North Dakota.

¹⁰ Whether Gisela Fredericks was or was not a resident of the reservation is irrelevant. Ties of residency cannot be allowed to circumvent, by way of interest analysis, limitations that restrict the exercise of sovereignty to members.

¹¹ This is not to say that the mere existence of a tribal interest sufficient to permit application of tribal law under modern choice of law analysis would give rise to the sort of "direct effect" on the "health or welfare" of the tribe required by the *Montana* standard. Thus, in remanding for assessment by the tribal courts of the tribe's jurisdiction under *Montana*, both *National Farmers Union Ins. Cos.* and *Iowa Mutual* effectively concluded that the "direct effect" prong of *Montana* is not necessarily satisfied in a tort action (as opposed to a "consensual" contract action) even when the injured litigant is a member of the tribe. In the present case, however, which is a dispute between two nonmembers, the absence of even the sort of tribal interest relevant to choice of law principles plainly rules out the possibility of tribal jurisdiction under *Montana*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 9, 1996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge
of the Tribal Court of the Three Affiliated Tribes of the
Fort Berthold Reservation; THE TRIBAL COURT OF THE
FORT BERTHOLD INDIAN RESERVATION; LYNDON BENE-
DICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL
JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB
PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,
v.

A-1 CONTRACTORS; LYLE STOCKERT,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE LAKE COUNTY, MONTANA,
AND FLATHEAD JOINT BOARD OF CONTROL
OF THE MISSION, FLATHEAD, AND
JOCKO VALLEY IRRIGATION DISTRICTS
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
A. Lake County, Montana	1
B. Flathead Joint Board of Control of the Mission, Flathead, and Jocko Valley Irrigation Districts..	3
SUMMARY OF ARGUMENT	8
ARGUMENT	15
I. A TRIBE'S SOVEREIGNTY, UNFOUNDED IN THE CONSTITUTION, LIMITED TO AS- PECTS OF SOVEREIGNTY NOT INCONSIST- ENT WITH ITS DEPENDENT STATUS, CONCERNING ONLY CONTROL OF IN- TERNAL AFFAIRS, CANNOT SURVIVE THE ABROGATION OF THE POWER TO EXCLUDE	15
II. THE CONSTITUTIONAL STRUCTURE AND THE FUDNAMENTAL RIGHTS OF INDIVID- UAL CITIZENS PRECLUDE THE EXERCISE OF EXTRA-CONSTITUTIONAL SOVEREIGN POWER BY A TRIBE OVER NONMEMBERS IN OPEN AREAS OF A RESERVATION	20
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

Page

<i>A-1 Contractors v. Strate</i> , 76 F.3d 930 (8th Cir. 1996) <i>en banc</i> , cert. granted, — U.S. — (1996)	9
<i>Adarand Constructors, Inc. v. Pena</i> , — U.S. —, 115 S.Ct. 2097 (1995)	28
<i>Avery v. Midlands County</i> , 390 U.S. 474 (1968)	28
<i>Ball v. James</i> , 451 U.S. 355 (1981)	28, 29
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	29
<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1989)	<i>passim</i>
<i>Clairmont v. United States</i> , 225 U.S. 551 (1912)	11
<i>County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 502 U.S. —, 112 S.Ct. 683 (1992)	17
<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	22, 24, 26
<i>Edmonson v. Leesville Concrete Co.</i> , — U.S. —, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)	29
<i>Fletcher v. Peck</i> , 6 Cranch 87 (1810)	13
<i>Hagen v. Utah</i> , — U.S. —, 114 S.Ct. 958 (1994)	5
<i>Hinshaw v. Mahler</i> , 42 F.3d 1178 (9th Cir. 1994), cert. denied, — U.S. —, 115 S.Ct. 485 (1994)	6
<i>Iowa Mutual Insurance Cos. v. LaPlante</i> , 480 U.S. 9 (1987)	8, 9
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944)	28
<i>M'Culloch v. Maryland</i> , 17 U.S. 316 (1819)	25
<i>Martin v. Hunter's Lessee</i> , 14 U.S. 304 (1816)	25
<i>Members of the California Democratic Congressional Delegation v. E.U.</i> , 790 F.Supp. 925 (1992)	27
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	26
<i>Middlemist, et al. v. Pablo, et al.</i> , 23 ILR 6141 (1996)	21
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
<i>Moran v. Council of the Confederated Salish and Kootenai Tribes</i> , 22 ILR 6149 (1995)	6, 25

TABLE OF AUTHORITIES—Continued

Page

<i>National Farmers Union Insurance Co. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)	8, 9
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	25
<i>New York v. United States</i> , — U.S. —, 112 S.Ct. 2408 (1992)	11
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	13, 21
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	26
<i>Powers v. Ohio</i> , — U.S. —, 111 S.Ct. 1364 (1991)	26, 29
<i>Red Fox v. Hettich</i> , 494 N.W.2d 638 (1993)	16-17
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	26, 28
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	14, 21
<i>South Dakota v. Bourland</i> , 508 U.S. 679, 113 S.Ct. 2309 (1993)	<i>passim</i>
<i>State of Montana, et al. v. United States Environmental Protection Agency, et al.</i> , — F. Supp. — (D.C. Mont. 1996); <i>on appeal to the Ninth Circuit Court of Appeals</i> , No. 96-35508	7
<i>Tull v. United States</i> , — U.S. —, 107 S.Ct. 1831 (1987)	12
<i>United States v. De Gross</i> , 960 F.2d 1433 (9th Cir. 1992)	29
<i>United States v. Kagama</i> , 118 U.S. 375 (1886)	15
<i>United States v. Unzueta</i> , 35 F.2d 750 (D.C. Neb. 1929)	11
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	25
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996)	9, 10, 12

CONSTITUTION, DECLARATION OF
INDEPENDENCE, STATUTES AND
ORDINANCES

United States Constitution, Preamble	25
Declaration of Independence	23, 24-25
Clean Water Act, 33 U.S.C. §§ 1251, <i>et seq.</i>	4, 10
Flathead Allotment Act of April 23, 1904, 33 Stat. 302	2, 3
General Allotment Act, 25 U.S.C. §§ 331, <i>et seq.</i>	2

TABLE OF AUTHORITIES—Continued

	Page
Act of February 22, 1889, — Stat. —, Enabling Act for Montana, North and South Dakota, and Washington	2, 3
Act of April 30, 1908, 35 Stat. 83	3
Act of May 29, 1908, 35 Stat. 448	3
Act of May 10, 1926, 44 Stat. 453	3, 4
§ 85-7-101, <i>et seq.</i> , Montana Code Annotated	3
Ordinance 36B, Flathead Tribes Law and Order Code	12-13
Ordinance 87A, Flathead Tribes Aquatic Lands Conservation Ordinance	7
 ADMINISTRATIVE MATERIALS	
U.S. EPA Final Rule Pertaining to Treating Tribes as States for Purposes of Water Quality Standards, 56 Federal Register 64876 (1991)	10, 20
 OTHER AUTHORITIES	
Fergus M. Bordewich, <i>Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century</i> (Doubleday 1996)	22-23
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1971 ed.)	12
L. Scott Gould, <i>The Consent Paradigm: Tribal Sovereignty at the Millenium</i> , 96 Columbia Law Review 809 (May 1996)	22, 23
Rev. Martin Luther King, Jr., <i>A Testament of Hope: The Essential Writings of Martin Luther King, Jr.</i> (James M. Washington, Ed. 1986)	26-27
Richard Lempert, Joseph Sanders, <i>An Invitation to Law and Social Science: Desert, Disputes and Distribution</i> (Longman 1986)	28
Toni Makkai, John Braithwaite, <i>Procedural Justice and Regulatory Compliance</i> , 20 Law and Human Behavior, 83 (1996)	27
Plutarch, <i>Lives: Themistocles</i> (Walter J. Black, 1951)	24
John Rawls, <i>A Theory of Social Justice</i> (Belknap Press 1973)	27-28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1872

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation; THE TRIBAL COURT OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

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BRIEF OF AMICI CURIAE LAKE COUNTY, MONTANA,
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OF THE MISSION, FLATHEAD, AND
JOCKO VALLEY IRRIGATION DISTRICTS
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, *amici curiae* file this brief in support of Respondents. Letters of consent from counsel for all parties have been filed with the Clerk.

A. Lake County, Montana

Upon entry of the State of Montana into the Union¹, and after a later reorganization of counties, the State placed within the ambit of Lake County's authority and responsibility most of the land within the exterior boundaries of the federal Flathead Indian reservation, which Congress reserved from the Nation's public lands when it ratified the July 16, 1855 Treaty of Hellgate on March 13, 1859 (12 Stat. 975).² In 1904, Congress enacted the Flathead Allotment Act ("FAA"), Act of April 23, 1904, 33 Stat. 302, implementing the policies of the General Allotment Act ("Dawes Act") of 1887 (codified as amended, at 25 U.S.C. §§ 331, *et seq.*) on the Flathead reservation. After making allotments of land to tribal members, Congress, in the FAA authorized nonmembers to enter the reservation and acquire fee title to land under the "general provisions of the homestead, mineral, and town-site laws of the United States," with two exceptions, the second of which is particularly significant. First, timber lands were not subject to entry. Second, as upon the entry of the State into the Union, Congress granted sections sixteen and thirty-six of each township within the exterior boundaries of the reservation to the State for

¹ § 10, Act of February 22, 1889, — Stat. —, "An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted into the Union on an Equal Footing with the Original States, and to Make Donations of Public Lands to Such States," providing, *inter alia*, for the grant of each section 16 and 36 within the territory of the states for school purposes, "except those embraced in Indian, military, or other reservations . . . until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

² In addition, Lake County encompasses a good deal of land beyond the exterior boundaries of the reservation and including thousands of County residents whose status is no different from those residing within the exterior boundaries of the reservation, but for that single fact.

school purposes. FAA, § 8³. The County seat is located in the town of Polson, within the exterior boundaries of the reservation.

B. Flathead Joint Board of Control of the Mission, Flathead, and Jocko Valley Irrigation Districts

In 1908, in an amendment to the FAA, Congress authorized the construction of an irrigation and power project to irrigate all irrigable allotted and unallotted lands within the boundaries of the reservation. Act of May 29, 1908, 35 Stat. 448, amending §§ 9 and 14 of the FAA. *See also* Act of April 30, 1908, 35 Stat. 83. After the completion of the majority of construction on the irrigation project, Congress in 1926 enacted legislation authorizing the formation and operation of the Districts under state law and their jurisdiction over all fee lands. Act of May 10, 1926, 44 Stat. 453, 464.

The Flathead Joint Board of Control ("JBC") serves as a central operating authority for the Mission, Flathead, and Jocko Valley Irrigation Districts, formed in the late 1920's and early 1930's under state law as provided by the 1926 Act. Each entity is a local government under Montana law. § 85-7-101, *et seq.*, Mont. Code Ann. (1995). The land and constituents they serve are located within the original exterior boundaries of the reservation. The Districts contain within their boundaries approximately 113,000 acres. Their constituency is comprised of both tribal members and nonmembers, presumably in roughly the same percentages as the general population.⁴

³ *See* note 1, quoting language from Enabling Act of February 22, 1889, indicating that Congress' grant of sections 16 and 36 of each township would occur after "the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain."

⁴ The Districts and JBC as local governments are neither interested in nor legally allowed to make any decisions based on a constituent's race or even to inquire into his or her race. They, therefore, do not have information on this issue. The Flathead

See below. Approximately 2,000 families, farmers and ranchers, are represented by the Districts and JBC.

As the result of these and other Congressional acts implementing the Dawes Act, nonmembers constitute 81-82 percent of the population of the Flathead reservation today.⁵ Of the 1.245 million acres within the original reservation, 553,151 acres are now owned by nonmembers.⁶

In this brief, *Amici* are concerned with preserving their ability to exercise the authority delegated them by the State to fulfill the responsibilities the Legislature requires them to bear on behalf of the citizens of the county and the members of the Districts.

Lake County's ability to perform its governmental functions is impaired and at times shackled by assertions of regulatory and adjudicatory authority by the Flathead Tribes over non-tribal lands and people.⁷ At times its citizens receive less governmental service, uneven protection of the laws, and more governmental interference as a

Tribes, however, do keep track of such statistics, and they are the source of the figures here.

⁵ The 1990 census recorded 21,259 individuals living on the reservation. Of these, 5,110 are Native Americans. Of this latter amount, according to the Flathead Tribes, 3,976 are tribal members.

⁶ The Flathead Tribes provided this data in an application to the Environmental Protection Agency for Treatment as a State status under §518 of the Clean Water Act (33 U.S.C. § 1377) to establish water quality standards, regulate wetlands, and issue § 401 certifications for the entire reservation. *Amici* assume their essential veracity.

⁷ *Amici* serve all their constituents, tribal members and nonmembers. They do not necessarily concede they lack, *in toto*, either responsibility for or authority over tribal lands or members. Under the 1926 Act, the JBC and Districts clearly do have responsibilities for tribal member land owned in fee. *Amici* recognize, however, certain limits to their authority. Since the issue in this case concerns tribal authority over nonmembers on open, non-tribal property, *amici* address only the potential implications of this decision for their responsibilities to nonmember citizens.

result of the conflicts of authority arising from the Tribes' assertions of powers over nonmembers. The government of Lake County is burdened, indeed, retarded by this situation in much the same manner as were the local governments analyzed in *Hagen v. Utah*, — U.S. —, 114 S.Ct. 958, 970 (1994). The fulfillment of many government duties, routine in other counties, such as roadwork, repair of bridges, placement and updating of traffic controls, zoning, and planning are often deferred, delayed, or simply canceled. The work of law enforcement and fire fighting, and other emergency service, which more than other government functions frequently require swift and sure action, is also delayed, complicated, and at times, unfortunately, unfulfilled because of issues arising out of jurisdictional conflicts over land and people.

Lake County is traversed by state and federal highways. One, Highway 93, which runs North and South through the county, is a narrow two-lane highway in need of updating, especially to accommodate the influx of permanent residents to the area and tourists. Lake County is situated between the city of Missoula 30 miles to the South, the largest population center in western Montana, and tourist centers to the North, such as Glacier Park, Whitefish ski resort, Kalispell and Flathead Lake. Literally tens of thousands of tourists, from Montana and elsewhere, traverse Lake County through Highway 93 every year. Neither they nor nonmember residents of Lake County have in any way consented, by their presence in the portion of Lake County within the reservation, to tribal government's control of them.

Yet, the Flathead Tribes have asserted civil regulatory authority over nonmembers on non-tribal property, encompassing also adjudicatory authority. This claim of sovereignty extends to many aspects of daily life, including control of water quality issues, to the exclusion of state, and therefore local, government authority. It also includes

authority to adjudicate disputes which arise anywhere on the reservation, including the state and federal highways.⁸ This places administrative and financial burdens on Lake County, including its judicial system, the Twentieth Judicial District of Montana.

It also places Lake County in the anomalous position of having to treat issues arising within the boundaries of the reservation but on non-tribal property in a manner significantly different from the way they would be handled, perhaps only a few steps away, off the reservation. Thus, by their various and broad claims of sovereignty, the tribes cause Lake County to treat its constituents differently. And they cause Lake County residents living within the boundaries of the reservation to receive not only different governmental services but services often of a more intrusive, complicated, and inconclusive nature and of a lesser quality. This has additional negative social effects for Lake County.

Because of the tribe's claims to sovereignty over nonmembers and their property, county residents who are not tribal members but who fall within the compass of the tribes' claims, frequently express frustration, anger, fear, and ultimately cynicism about their state and local governments, tribal government, and their status, as they see it, as second class citizens subject to the claims of a government which excludes them. In Lake County's experience, this gives rise not only to apathy and cynicism about government. Because of uncertainty about whether state and local or tribal regulatory powers, or both, apply to non-tribal property, Lake County's experience shows

⁸ See Ordinance 36B, Flathead Tribes Law and Order Code, Ch. 1, § 1, asserting jurisdiction to the "fullest extent possible not inconsistent with federal law" over "all persons found within the reservation." As quoted in *Moran v. Council of the Confederated Salish and Kooteni Tribes, et al.*, 22 ILR 6149 (1995). See also *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994) cert. denied — U.S. —, 115 S.Ct. 485 (1994).

that county residents are at times reluctant to voluntarily comply with permitting programs or even to report incidents—such as a spill requiring a clean up response—for fear they will be heavily penalized through one of the number of tribal civil regulatory ordinances in which the tribes claim sovereignty over nonmember activity on non-tribal property.⁹ This hampers Lake County's ability to administer and enforce regulatory programs, particularly through voluntary compliance, the most effective, economical, and least intrusive means of governmental regulation.

For these reasons, Lake County and the JBC oppose what they believe are excessive claims of tribal sovereignty over nonmembers on non-tribal property, both because nonmembers cannot participate in that government and because it excludes the republican forms of local government expressly authorized and required by Congress in the Enabling Act of February 22, 1889 and the Act of May 10, 1926. Cf. *State of Montana, Lake County, et al. v. United States Environmental Protection Agency, et al.*, —F.Supp. — (D.C. Mont. 1996), on appeal to Ninth Circuit Court of Appeals, No. 96-35508.

As to non-tribal property within reservation boundaries which Congress opened to nonmember access and from which the tribes may not exclude anyone, *amici* believe the Court has clearly held tribal inherent sovereign power abrogated. *Amici* argue that, as to such non-tribal property in an "open" area, the Court's decisions allow tribes to affect and control the activities of nonmembers through an action in federal court in the appropriate circumstance, if the activity constitutes a demonstrably serious impact on the tribe, imperilling its political integrity, economic security, or health or welfare. This standard derives from

⁹ For example, in the Aquatic Lands Conservation Ordinance, No. 87A, the Flathead tribes assert authority over all activities on wetlands within the reservation, including the 50% non-tribal land, as well as the authority to levy fines, and enforce them in tribal court, of up to \$25,000.00 per day for noncompliance.

the Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) (the "second *Montana* exception) and the discussion there of possible sources of tribal authority over nonmember activity on non-tribal property; and the refinements to that discussion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) and *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309 (1993).

The Flathead tribes, however, like other tribes around the country, including the Petitioners here, continue to rest broad claims to sovereign authority over nonmember activity on non-tribal property in open areas on an over broad interpretation of this possible exception to the general rule. *Amici* therefore ask the Court to state the rule, on the grounds given below, that nonmember activity on non-tribal property from which the tribe has no power to exclude anyone lies beyond the reach of the tribe's inherent sovereign power.

SUMMARY OF ARGUMENT

1. This case presents the issue of the limits of an Indian Tribe's inherent sovereign power over those who are not members of the Tribe, including whether there are constitutional limits to such power. *Amici* urge the Court to affirm the lower court's decision and in so doing to establish that a tribe's sovereign power runs only to those who have given their consent, either as members of the tribe or in exchange for access to property over which the tribe retains the power of exclusion.

2. These amici assume Respondents and other amici will cut through the thickets of preliminary and largely irrelevant argumentation presented by Petitioners and their supporters. To be sure, this Court wrote in its opinions in two cases of the centrality of tribal courts for the exercise of sovereignty. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual*

Ins. Co. v. LaPlante, 480 U.S. 130 (1982). The United States are in fact supportive of tribal sovereignty; Congress has generously supported the flowering of tribal courts and the invigoration of tribal governments. Many tribal courts are, in fact, more competent and well-staffed than even fifteen years ago.

A. Such assertions, however, beg the question.¹⁰ The cases Petitioners and their supporters now set up as exemplars of this Court's recognition of sweeping tribal sovereignty in all the fullness of that term in fact established a procedure requiring the exhaustion of tribal remedies before challenging assertions of tribal jurisdiction in federal court. Nothing more. See *Yellowstone County v. Pease*, 96 F.3d 1169, 1175 (9th Cir. 1996) (agreeing with the Eighth Circuit *en banc* decision in this case that *Iowa Mutual* and *National Farmers* are "exhaustion cases that did not decide whether tribes had jurisdiction over nonmembers," the Ninth Circuit rejected the argument these decisions extended tribal sovereignty or that "tribal

¹⁰ *Amici* United States, relying on language from *Iowa Mutual v. Laplante*, 480 U.S. at 9, 19, link their argument in favor of tribal sovereignty here with the statement that "attacks on the institutional competency of tribal courts [are] 'contrary to . . . congressional policy.'" It should be clear that opposition to a Tribe's "excessively claimed sovereignty," (*A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996)), is not an attack on the competence of that Tribe's institutions. Conversely, the competence of a Tribe's institutions cannot create sovereignty where it does not exist. Finally, Congress' policy to generously support the creation of competent tribal institutions neither magically makes such competence a reality nor creates sovereign power for those institutions to wield where it does not otherwise exist. Thus, it is illogical to argue that because tribal courts are competent or because Congress desires them to be so their sovereign—the Tribe—*ipso facto* possesses authority over nonmembers. Whether a tribal court has the professional competence to handle a matter and whether a tribe possess sovereign authority over the matter are two separate inquiries, and the first is not relevant to the second.

adjudicatory jurisdiction over non-Indians is much broader than the tribal regulatory authority. . . .")¹¹

B. Similarly, that Congress, exercising its plenary power over Indian affairs, has supported tribal courts and tribal self-determination, neither alters nor answers the question: what inherent sovereign powers do Indian Tribes have over nonmembers? The representative of the people of the United States, and the keeper of the plenary power of the United States over Indian affairs, Congress, has in fact supported tribes in many ways. But such policies do not create inherent sovereign power or limit its contours. Congress' enactments on behalf of tribes nowhere state the intent to extend tribes' sovereign power to nonmembers. The proper inference to draw from the lack of congressional extension of tribal sovereignty in its numerous acts in support of many tribal interests, as *amici* Yavapai-Apache Nation, *et al.*, state, is that "Congress has favored a 'hands off' approach with regard to tribal sovereignty." *Yavapai*, at 10.¹² Congress supports tribes in many ways; it supports tribal sovereignty to the

¹¹ The Ninth Circuit also approvingly quoted the Eighth Circuit's decision at issue here that, under the so-called "Second Montana Exception," the "'desire to assert and protect excessively claimed sovereignty'" is not a sufficient tribal interest to create tribal jurisdiction where it has been abrogated. *Pease*, 96 F.3d at 1175, n.5.

¹² Yavapai properly list among the various acts of Congress "reaffirming tribal sovereign authority" a variety of environmental laws, including the Clean Water Act. *Yavapai* at 10, n.9, citing, among others, 33 U.S.C. § 1377. It is notable, and correct, that Congress in § 1377 of the Clean Water Act "reaffirmed" tribal authority. It did not extend it; and, *amici* respectfully submit, contrary to an allusion by the plurality in *Brendale*, 492 U.S. at 428, it did not delegate federal power to tribes in this section. Both the structure of the section, which provides for treating tribes as states in specified instances, and the Act, under which states exercise only their own pre-existing power, support the Environmental Protection Agency's conclusion that Congress did not delegate federal power in this provision. 56 Fed. Reg. 64876, 64879-80.

extent it already exists. But, since the Dawes Act era when Congress abrogated many aspects of tribal sovereignty in many instances, particularly over nonmembers, Congress' fulsome support of tribes has not included revival and extension of authority over nonmembers. Congress' many acts in support of tribes evince the intent to improve their situation and that of their members within the limits of their existing legal authority. Congress has not extended those limits.

C. Likewise, the growing efficiency of tribal governments and their increasing competency cannot create inherent sovereignty where it does not exist. Efficiency, even ability, is not now and has never been in these United States a source of sovereignty. *New York v. United States*, — U.S. —, 112 S.Ct. 2408, 2434 (1992); *United States v. Unzueta*, 35 F.2d 750, 752, (D.C. Neb. 1929), citing *Clairmont v. United States*, 225 U.S. 551 (1912), which held a railroad right of way granted by Congress to have been withdrawn from the Flathead reservation, for the proposition that "the mere difficulty of (split jurisdiction) enforcing state authority over a strip of land extending through an area under federal jurisdiction is not controlling."

D. Finally, the distinction Petitioners and their supporters strain to draw between a tribes' regulatory jurisdiction over nonmembers, which they recognize the Court has limited, in most cases, to tribal members and tribal property, and its adjudicatory jurisdiction lacks both merit and footing in the law. While it is true that commonly two separate branches of government exercise regulatory and adjudicatory jurisdiction, these powers derive from the same source—the sovereignty of the government that created them—and cannot exceed that source in reach. There is no basis for distinguishing between "regulatory sovereignty" and "adjudicatory sovereignty." Courts, in themselves, do not have "sovereignty," just as regulatory agencies do not. The sovereign has sovereignty which its

courts and agencies exercise through their jurisdiction, given them by the sovereign. Thus, tribal adjudicatory jurisdiction cannot exceed the sovereignty of the tribe.¹³ See *Pease*, 96 F.3d at 1175; citing the *en banc* opinion below and rejecting the argument the tribe's adjudicatory jurisdiction exceeds its regulatory jurisdiction. *Amici United States'* argument in this regard contains the seeds of its failure. They note, imprecisely, that states in some instances adjudicate matters between nonresidents. They then equate tribes with the several states, implicitly assuming one of the key issues here—that tribes possess "territorial jurisdiction" just as do states—and argue tribes too should have the authority to adjudicate matters between "nonresidents," that is, "non-Indians." But tribes are not states.¹⁴ They have no constitutional standing as

¹³ See Felix Cohen, *Handbook on Federal Indian Law*, at 145 (1971). Noting that the power to administer justice follows and flows from the power of "self-government," Cohen offered the example that if a tribe has the power to regulate "marriage relationships of its members, it necessarily has the power to adjudicate . . . controversies involving such relationships." He thus concluded, "the judicial powers of the tribe are co-extensive with its legislative or executive powers." This is logical and well-grounded in the Court's decisions. It rebuts the claim that adjudicatory jurisdiction can be unhinged from its sovereign source and reach out, a free agent of tribal power, unmoored and disembodied from its only source of authority, tribal inherent sovereignty.

¹⁴ Moreover, "non-residents" are not equivalent, in the context of tribal power, to "non-Indians." First, on numerous reservations, non-Indians and Indians who are nonmembers are residents of the reservation. In the case of the Flathead reservation, 81-82% of the population consists of nonmembers of the tribes; approximately 50% of the reservation land is owned by nonmembers. Second, in state courts, non-residents enjoy the full complement of federal rights, including constitutional rights, which extend to civil as well as criminal matters. *Cf. Tull v. United States*, — U.S. —, 107 S.Ct. 1831 (1987), detailing right to jury trial in civil enforcement matters. Juries limited to a particular race and ethnicity, excluding by law persons of the defendants' race or ethnicity, are clearly unconstitutional. Yet in most if not all tribal courts, juries are limited to tribal members. *Cf. Flathead Tribes Law and Order*

sovereigns, lack any constitutional constraints in governing, and, as a result of their status within the United States, exercise limited, quasi-sovereign powers over internal matters subject to the plenary power of Congress.

3. Once past these thickets then, the resolution not only of this case but the general issue of tribal jurisdiction over nonmembers requires the application of two inter-related analyses, both of which result in the conclusion the Tribes lack the sovereign power they assert.

A. First, Congress' acts and the decisions of the Court clarify an Indian tribe does not possess territorial sovereignty and lacks inherent sovereign power over nonmember conduct on non-tribal property, an easement, within the exterior boundaries of a reservation but alienated to one of the States and from which the Tribe has no power to exclude anyone. The Court's decisions, contrary to Petitioner's suggestion, from its earliest encounter with this issue, *Fletcher v. Peck*, 6 Cranch 87, 147 (1810)¹⁵, to the present day determine this conclusion. *Montana*, 450 U.S. 544 (1981); *Brendale*, 492 U.S. 408 (1989); *Bourland*, 508 U.S. 679 (1993).

B. Second, when analyzed against the Constitution, its allocation of powers among the two sovereigns it establishes and its guarantees of certain fundamental rights to citizens, tribal sovereign power over nonmembers is revealed as anomalous and, if such power ex-

Code, Ch. I, § 7.3, "eligible jurors shall be residents of the Flathead Reservation and enrolled members of the Tribes who are qualified to vote. . . ." Similarly, in state courts, judges cannot be limited to a particular race and ethnicity. Yet in most if not all tribal courts, race and ethnicity—tribal membership—is an explicit criterion. *Id.* at § 3.4, eligibility to serve as tribal judge limited to tribal members.

¹⁵ As noted by the Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) Mr. Justice Johnson, concurring in *Fletcher v. Peck*, stated that the overriding sovereignty of the United States had reduced tribes' sovereignty by divesting them of the right of governing anyone but themselves.

ists at all, it should be closely cabined. The Constitution, as conceived and amended, allowed the exercise of sovereignty in the United States by only two entities—the national sovereign and the states. It established a careful balance of sovereign power between these. It guarantees to individual citizens certain fundamental rights; it reserved to the states and to the people those powers not delegated to the United States or reserved by the states. Tribes have no standing under the constitution as sovereigns. Their power exists at the sufferance of Congress, which has plenary authority over Indian affairs, and which, unlike Tribes, the Constitution limits in its power to act or authorize actions. Indian tribes, not thus constrained, have been allowed to engage in policies and take actions against those within their sovereign power repugnant to the constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, n. 7 (1978). This is anomalous. In the case of tribal members, they can, perhaps, be presumed to have consented to such government. In the case of a nonmember seeking a tribe's permission to access property over which it retains the power of exclusion, this presumption may also be warranted. A tribe presumably could extract such consent in exchange for doing business with it. But in the case of a nonmember on nontribal property, over which the tribe lacks the power of exclusion, there is no basis for this presumption.

Moreover, nonmembers are excluded from citizenship—full and equal participation in the process of government—in tribes. They are excluded either because of their race, their ancestry, or their ethnicity. And because of these immutable factors, they have not and cannot give their consent to be governed by a tribe.

Amici therefore argue the lack of constitutional standing for and constraints on tribal authority and the undisputed, fundamental constitutional rights of U.S. citizens preclude tribes from exercising sovereign power over nonmembers absent some other source of acquiring such au-

thority, such as the power to exclude or the explicit consent of the nonmember.

ARGUMENT

I. A TRIBE'S SOVEREIGNTY, UNFOUNDED IN THE CONSTITUTION, LIMITED TO ASPECTS OF SOVEREIGNTY NOT INCONSISTENT WITH ITS DEPENDENT STATUS, CONCERNING ONLY CONTROL OF INTERNAL AFFAIRS, CANNOT SURVIVE THE ABROGATION OF THE POWER TO EXCLUDE.

Petitioners and their supporters argue from the assumed premise that tribes are sovereigns equivalent to states. This, of course, is erroneous. The corollary derived from this premise, that tribes possess territorial jurisdiction, is also erroneous.

The first principle of tribal sovereignty is not that it is inherent, which explains little more than its lack of constitutional grounding or constraints, but that it is limited, quasi-sovereign in nature, containing aspects but not the full plumage of sovereignty³⁶. It is limited first because the Constitution does not recognize tribes as sovereigns. *United States v. Kagama*, 118 U.S. 375 (1886).

³⁶ Limited sovereignty, of course, entails limitations not only on governmental power but also governmental responsibility. This is borne out in the practical responsibilities of tribal and state governments. State and local governments have considerable responsibility to provide services to tribal members just as to nonmember citizens. Within the boundaries of many reservations, they provide law enforcement and fire protection, schools, municipal services such as sewer and water, road construction, maintenance, and improvement. Of no little consequence, they must also provide the machinery of fair and equal elections for state and local campaigns as well as access to civil courts. The federal government also, of course, provides many governmental services to tribes and their members. Sovereign power, then, clearly has a dual nature, one imposing responsibilities on government the other the power to fulfill these. Tribes' limited sovereignty is matched by their limited responsibilities, which run solely to their members.

As to nonmembers, whatever the particular factual situation, the general rule is that tribal governments lack jurisdiction over non-members. *Montana*, 450 U.S. at 565; *Bourland*, 113 S.Ct. at 2318. Tribes' incorporation into the United States caused their "inherent sovereignty . . . [to be] divested to the extent it is inconsistent with the tribes dependent status, that is, to the extent it involves a tribe's 'external relations.'" *Brendale*, 492 U.S. 425-26; citing *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).¹⁷ The Court has consistently held "that the regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested." *Brendale*, *supra*, at 427; quoting *Wheeler*, *supra*, at 326.

In *Montana*, the Court said it "defies reason" that Congress would have intended the Tribe to retain such power after it had opened tribal property to nonmembers and abrogated the tribe's power of exclusion, because nonmembers have no voice in tribal government. *Id.* at 559, n.9, 561; *Brendale*, 492 U.S. at 422-425 and *Bourland*, 113 S.Ct. at 2316, 2318. The Court noted the possibility that in exceptional circumstances, when a tribal government demonstrates that the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" it then "may" have some power over the nonmember conduct. *Id.* at 566. It did not say that even if the circumstances outlined were proven a tribe would have such authority. It only said that it "may." See *Brendale*, 492 U.S. at 428, emphasizing this. This possible exception to the general rule, however, was not part of the Court's holding and is *dicta*. See *Brendale*, *supra*, *Red Fox v.*

¹⁷ As the Court noted in *Brendale*, *supra* at 426, n.9, a tribe's retained inherent sovereignty could also be divested by treaty or statute.

Hettich, 494 N.W. 2d 638, 646 (1993): "*Montana* went on to note, without deciding, that a tribe may have other authority as well."

The Court has subsequently indicated that a showing by a tribe under this concept would not cause the recreation of sovereignty Congress had abrogated but would give rise to a federal cause of action. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. —, 112 S.Ct. 683, 692, 116 L.Ed.2d 687 (1992);¹⁸ *Brendale*, 492 U.S. at 430-431; *Bourland*, 113 S.Ct. at 2320, n.15, 2321. In *Brendale* the Court carefully refuted any suggestion that such narrow power could include police power. *Brendale*, 492 U.S. at 421 (noting the Ninth Circuit had found the Tribe did have police power), 429, n.11 (stating that equating a tribe's retained sovereignty with a local government's police power "is contrary to *Montana* itself").

As to non-tribal property in open areas from which the tribe cannot exclude anyone, six members of the Court ruled that a tribe has no sovereign authority over nonmember activity. To be sure, the plurality written by Justice White did not rely on the determination of whether the nonmember land was in an "open" or "closed" area. But this fact offers no succor to Petitioners because the plurality (White, Rhenquist, Kennedy, Scalia) said that tribes have no such authority in any case, whether the land is in an open area or not. *Id.* at 430-32. The plurality posited that, if a tribe made a proper showing this would not recreate abrogated sovereignty but, in the right circumstance, it would give rise to a federal cause of action. *Id.* at 430-31.

¹⁸ Although the *Yakima County* decision did not concern tribal government authority over non-members, the court's characterization of the "very narrow" powers of tribal governments over non-members, as well as its approving reference to the "protectable interest" analysis of the *Brendale* plurality, deserve great weight because of the overwhelming support they received in that case (8-1). *Id.* at 692.

"The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether and to what extent the tribe has a protectable interest in what activities are taking place on fee land within the reservation. . . . But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Id.*

As to non-tribal property in open areas, the concurrence agreed. The concurrence did not even mention the "Second *Montana* Exception" or bother to examine the effects of the nonmember activity on the tribe, implicitly dismissing this as a factor in the sovereignty question. Rather, they concurred in the judgment of the plurality as to non-tribal property in an "open" area of the reservation. *Id.* at 444-447. While disagreeing with the plurality's decision that tribes lack jurisdiction over nonmembers on non-tribal property in all cases, the concurrence implicitly adopted, without comment, the plurality's position that as to nonmember activity in this area the tribe could only have a cause of action: "So long as the land is not used in a manner that is preempted by federal law, the Tribe has no special claim to relief." *Id.* at 445.

Thus, in its first review of the application of its *dicta* from *Montana*, four members of the Court said it is not a basis of sovereign authority in any situation; and two reached the same conclusion as to "open" areas.

Later, in *Bourland* the Court held that tribal government lacked jurisdiction over nonmember hunting and fishing on fee land and in waters over fee land owned by the federal government. The precise question in *Bourland*, which set it apart, if only slightly and temporarily, from the ambit of the Court's *Montana* and *Brendale* decisions, was whether the principles enunciated in those cases applied to property owned by the federal government. Emphatically holding they do, the Court's opinion in *Bour-*

land enunciated the rule that there can be no tribal jurisdiction over nonmember activities in areas "broadly opened" to nonmembers.

The Court emphasized that when Congress opens reservation lands to nonmembers, "[t]hese statutes clearly abrogated the Tribe's 'absolute and undisturbed use and occupation' of these tribal lands . . . and thereby deprived the Tribe of the power to license non-Indian use of the lands." *Id.* at 2321. (Emphasis added). The Court stated "the reality . . . after *Montana* [is that] tribal sovereignty over nonmembers' cannot survive without express congressional delegation," 450 U.S. at 564, and is therefore, not inherent." *Id.* at 2320, n.15.

Amici contend that in *Bourland*, the seven-member majority made explicit the implied ground of agreement between the *Brendale* plurality, which held that a tribe simply has no jurisdiction over nonmembers on non-tribal property, and concurrence, which held that as to land in an "open" area a tribe had no jurisdiction over nonmembers, but in a "closed" area the tribe had jurisdiction: when the property in question is part of an area "broadly opened" by Congress to entry by nonmembers the tribe can have no jurisdiction over nonmembers. *Id.* at 2318.

As to such an area, then, the "Second *Montana* exception," if proven by a tribe, would support a cause of action in federal court to enjoin the offending nonmember activity, but not the re-creation of tribal inherent sovereignty previously abrogated by Congress.¹⁹ In closed areas where

¹⁹ As noted by the Court in *Bourland*, 113 S.Ct. at 2320, n.15, if treated as a source of re-creating sovereign authority rather than a cause of action, the second *Montana* exception contains a logical glitch. That is, once abrogated, inherent sovereignty could not simply be magically generated again by the appearance of some activity which the tribe deemed a threat. Once Congress has taken action abrogating a power, under the Supremacy Clause it seems not only illogical but insupportable to allow that it could be reconstituted in the right circumstance upon the assertion of a tribe.

the tribe has another logical and unabrogated source of authority—the power to exclude—it may retain also the power of limited sovereignty.

Many Tribes and federal agencies, however, have interpreted the second *Montana* exception far beyond its logical limits, ignoring the court's indications that tribes may have only "very narrow" powers over nonmembers, until this possible exception has swallowed the rule. Cf. *EPA Final Rule Pertaining to Water Quality Standards*, 56 Fed. Reg. 64876, 64877-80 (1991), construing this exception to support the conclusion that if an applicant tribe demonstrates one of its members uses water within a reservation, it then has sovereignty to establish water quality standards for the reservation. In the instant case, the tribe and the United States urge the Court to reverse the presumption against tribal sovereignty over nonmembers and ratify their construction of the second *Montana* exception as authorizing the powers of general government in a tribe over nonmembers even in areas from which it cannot exclude anyone.

The rule proposed by *Amici* would obviously leave to tribes all their powers over internal relations, including their members and lands. The work of government required for such matters is not inconsiderable. Moreover, such a rule is not only solidly in keeping with the Court's previous 190 years of precedent but also comports with the constitutional concerns and limits preserving the powers of states and the right of individuals.

II. THE CONSTITUTIONAL STRUCTURE AND THE FUNDAMENTAL RIGHTS OF INDIVIDUAL CITIZENS PRECLUDE THE EXERCISE OF EXTRA-CONSTITUTIONAL SOVEREIGN POWER BY A TRIBE OVER NONMEMBERS IN OPEN AREAS OF A RESERVATION.

That the assertion of a Tribe's inherent sovereign power over nonmembers involves constitutional issues of the first magnitude brooks no dispute. Petitioners and their amici

supporters address this issue with varying degrees of concern. Petitioners state "there is nothing offensive about forcing non-Indians involved in civil disputes on Indian land to appear in tribal court." Pet. Bf, at 7, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Their supporters, in particular amici Yavapai, recognize the exercise of tribal power over nonmembers raises troubling constitutional issues, arguing such concerns animated the Court's decision in *Montana*.²⁰ At least one tribal court has directly recognized this fact, stating:

"[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues. Some exercise of inherent tribal authority over non-Indians is inconsistent with various allotment acts or other acts of Congress. In those instances the Supremacy Clause requires that tribal jurisdiction not extend to non-Indians."²¹

Commentators have long recognized the constitutional incongruities endemic to Tribes' assertions of sovereign power to govern people whom they exclude, on the basis of race, from participating in government. Recent scholarly commentary recognizes the Court's decisions concerning tribal authority over nonmembers²² hew to the consti-

²⁰ Yavapai's proposed solution, however, lacks merit. Their proposed "test" would reverse not only the presumption against tribal sovereignty over nonmember activity on fee land but also the prohibition against tribal criminal authority over nonmembers, except in those cases where the Constitution requires a grand jury. It, in essence, would establish a strong presumption of tribal sovereignty in all instances, except in the more "egregious" situations, which in Yavapai's view, the Court would have to address on an *ad hoc* basis.

²¹ *Middlemist, et al. v. Pablo, et al.*, 23 ILR 6141, 6143, n.5 (1996), Tribal Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

²² See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and*

tutional requirement that sovereign power derives from the consent of the governed, and therefore tribal power over nonmembers is, at the least, suspect. L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," 96 Columbia Law Review 809-902 (May 1996). Professor Gould, in fact, finds the Court has essentially decided that tribal sovereign power extends only to those whom it can be said have given the consent of the governed—tribal members. Gould, *supra*, at 810, noting the earliest decisions of the court applied the concept limiting tribal sovereignty to members. Thus, Gould, no opponent of expansive tribal authority, concludes "full territorial jurisdiction" based on "doctrines of inherent sovereignty and trust responsibility" cannot provide a source of authority over nonmembers because "they lack a textual basis in the Constitution."²³ *Id.* at 899. Lacking such a basis,

Bands of the Yakima Nation, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

²³ Professor Gould argues this lack of constitutional footing for tribal authority over nonmembers can only be made good by explicit congressional action conferring "full territorial sovereignty." He notes, however, that others have opined the remedy for this is the development of a "penumbral, fundamental right," or protection for tribes under the First or Ninth Amendment, or that tribes have "rights as separate peoples" because they are not subject to equal protection requirements. Gould at 898; citing Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. Pa. L. Rev. 195, 245 (1984) (penumbral right); Kevin J. Worthen, *Sword or Shield: The past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 Harv. L. Rev. 1372 (1991) (Tribes rights under First Amendment); Russell L. Barsh & James Y. Henderson, *The Road: Indian Tribes and Political Liberty* 112, 264-267 (1980) (Ninth amendment protects tribal sovereignty as fundamental right); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991) (lack of equal protection provision allows giving tribes rights as separate peoples). Other commentators argue tribes' diminished sovereignty can be constitutionally extended to nonmembers only by enactment and ratification of a constitutional amendment. See Fergus M. Bordewich, *Killing the White Man's*

Gould agrees with other commentators that assertions of tribal sovereign power over nonmembers fail because they "too starkly challenge western notions of democratic self-government." Gould at 900. *Amici* agree.

"Democratic self-government" has been viewed as a fundamental right requiring the government to obtain the consent of the governed for no small amount of the history of western and "Anglo-American" thought. The Declaration of Independence explicitly asserts that to secure fundamental rights governments must "deriv[e] their just powers from the Consent of the Governed. . . ." The rights of full and equal opportunity to participate in government are fundamental, and in our system immutable, implacable rights as against the government. That is, as a free people, citizens of the United States have, and under our constitution, unless that fundamental distribution of powers is radically altered, will never relinquish, the rights of full and equal participation in their governments, which is the exchange for the consent of the governed.

Claims of tribal sovereignty over nonmembers on non-tribal property, based on no other source of authority than the tribe's limited sovereignty or the concept of the second *Montana* exception, conflict head on with these rights and those they secure.

Indian: Reinventing Native Americans at the End of the Twentieth Century, at 338.

Gould is not sanguine about these potential remedies to the "problem" of limited tribal sovereignty. Believing Congress unlikely to enact legislation to restore "full territorial sovereignty," he explains "the consent paradigm fits too comfortably with Anglo-American notions of individual rights to be easily displaced." Gould at 900. One reason is that Tribes "efforts to assert inherent power . . . 'too starkly challenge western notions of democratic self-government'" because they exclude whole classes of people, often residents of the area who make up the majority of the population, on the basis of race and ethnicity. *Id.*; quoting Robert Clinton, *Reservation Specificity and Indian Adjudication; An Essay on the Importance of Limited Contextualism in Indian Law*, 8 Hamline L. Rev. 543, 568-69 (1985).

It "defies reason" (*Montana* at n. 9) and is "inconceivable" (*Brendale*, at 437 (concurrence)) that Tribes would retain jurisdiction over nonmember activity on non-tribal property in open areas precisely because of this. *Duro v. Reina*, 495 U.S. 676, 693-694 (1990); see also *Brendale*, at 446-447 (concurrence).²⁴ No governmental deprivation is more odious, more stigmatizing as the mark of a lesser citizen, more corrosive of democracy and respect for law than deprivation of the right to vote and hold office.²⁵

The enduring words and phrases in legal and political discourse are those which convey fundamental tenets. Ironically, by their very force and nature as the most basic blocks of law and society they are the more easily hackneyed. Nonetheless, familiarity cannot leach away their import as the foundational limits of our system, for any law or policy at odds with the basic principles may not long stand:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are insti-

²⁴ "Moreover, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance." *Id.*

²⁵ The severity of this sanction in a democracy was well understood in the Periclean age of Greece. In democratic Athens traitors siding with the Persians in their invasion of Greece under Xerxes were not put to death. Instead, they and their families were "put on the list of the disenfranchised." Plutarch's *Lives*, "Themistocles," Published by Walter J. Black, Inc. (1951) at 67. From then on, traitors and their families could not participate in the political life of the city or partake of the benefits of citizenship. Today, this sanction is reserved, in some states, to felons. In others, state authorities lack the power under their own laws to so proscribe even violent, recidivist felons.

tuted among Men, deriving their just powers from the consent of the governed."

Declaration of Independence.

From this tap root of legitimate government in the United States runs a direct line to the first words of the Constitution: "We the people of the United States . . . do ordain and establish this Constitution . . ." (Preamble, Constitution.) Government power, therefore, derives only from the people and may not exceed or violate the grant of power to which the people consented. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *M'Culloch v. Maryland*, 17 U.S. 316 (1819). Thus, "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979).²⁶

The price of this consent constitutes the single most important element of the scheme of government created in the Constitution—the right of full and equal participation in the government under which one must live:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In unequivocally holding that a citizen has a fundamental right to equal participation in the political process, the

²⁶ The Flathead tribes' Appellate Court recently issued a ruling in which it held the Tribes' sovereignty, like that of the State of Montana and the United States, "derive from the sovereign tribal membership"—i.e. the consent of the governed. *Moran v. Council of the Confederated Salish and Kootenai Tribes, et al.*, 22 ILR 6149, 6155; and see 6156, n.B0 (1995): "While the Tribes, i.e. the sovereign membership, delegated power to the Tribal Council . . . the authority of the Tribal Court originates from the inherent sovereign judicial power of the Tribes (membership), not from the Tribal Council." (Emphasis and parenthetical in original.)

Court recognized the even greater importance of the predicate.

"The right to exercise the franchise in a free and unimpaired manner is preservative or other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

"[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right; a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyer v. Doe*, 457 U.S. 202, 233 (1982).

Far from providing a reason to dismiss the constitutional rights and concerns of nonmembers, that tribal governments are not limited by the Constitution in wielding their power "is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis of power within our constitutional system." *Duro*, 110 St.Ct. at 2064; citing Justice Stevens' dissent in *Merrion*, 455 U.S. at 172-173.

Government in the absence of consent, indeed, unconstrained by the limitations in the Constitution protecting the rights of individuals, destroys the fabric of legitimate laws, to which the government may expect and demand compliance, by destroying the connection of the governed to the government. See *Powers v. Ohio*, —U.S.—, 111 S.Ct. 1364, 1368, 1369 (1991). Reverend Martin Luther King, Jr. wrote:

"The denial of this sacred right [to vote] is a tragic betrayal of the highest mandates of our democratic traditions and it is democracy turned upside down.

So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind—it is made up for me. I cannot live as

a democratic citizen, observing the laws I have helped to enact—I can only submit to the edict of others."

"Give Us the Ballot—We Will Transform the South," address delivered May 17, 1957, reprinted in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 197 (James M. Washington ed., 1986). Quoted in dissent of Tang, Circuit Judge, in *Members of California Democratic Congressional Delegation v. E.U.*, 790 F.Supp. 925, 933 (N.D.Cal. 1992). Justice Tang averred, without plausible threat of contradiction, that "[t]he right to vote sits at the very core of representative democracy. It is, moreover, a tool for self-help." *Id.* at 935.

Government without consent, if allowed, will lead to a breakdown in authority and the society it seeks to govern.²⁷ In a seminal study from a social science perspective of the requirements of a legitimate, just society, John Rawls, describing political liberty as a component of what he viewed as the most important factor in shaping a just society—equal liberty—wrote:

"The Principle of equal liberty . . . requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. . . . If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men's prospects in life, then the constitutional process should preserve the

²⁷ At both the "micro" and "macro" levels of social science, it is recognized that some level of control over a governing process for those subject to it is necessary to obtain compliance. See "Procedural Justice and Regulatory Compliance," 20 *Law and Human Behavior*, No. 1 (1996), at 83, 84, 93.

equal representation of the original position to the degree that this is practicable."

John Rawls, *A Theory of Justice* 221-222 (1973). See also, Richard Lempert and Joseph Sanders, "Law and Social Science 284-291 (1986).

However, anticipating the negative effects of government without the consent of the governed is not a necessary basis for protecting these basic rights. Their fundamental place in our Constitutional system suffices. Petitioners and their supporters, however, claim such concerns can be finessed, that it is not "offensive" to "force" nonmembers to come within the power of a tribe, that the dignity and integrity of tribal sovereignty (which cannot claim a constitutional source) requires nonmembers' rights be compromised and that nonmembers be satisfied with the lesser protections tribes may offer them under their various systems.

But it is true in Indian law as in other areas of the law that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to strict scrutiny." *Adarand Constructors, Inc. v. Peña*, —U.S.—, 115 S.Ct. 2097, 2106 (1995); quoting from *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The Court further observed: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . ." *Adarand* at 2106.

The authority the Tribes seek to exercise here—civil adjudicatory jurisdiction over torts—is one of the most important powers of general government and derives from police powers, which tribes lack. *Brendale*, 492 U.S. at 421, 429, n.11. In the United States, governments exercising general governmental power must adhere to the one-person one-vote rule of *Reynolds v. Sims*, *supra*. *Avery v. Midlands County*, 390 U.S. 474 (1968), as cited in *Ball v. James*, 451 U.S. 355, 364 (1981). Only when a govern-

ment exercises narrow powers limited to its members—not normal governmental activities affecting all people within the area—may it stray from this principle. *Ball v. James*, 451 U.S. at 364.

Contrary to Petitioners' assertion, it is "offensive" under federal law to impose a system of government which excludes people on the basis of their race or ethnicity. In this particular case, for example, it is unconstitutional to subject a civil defendant to a jury from which all but a particular race of people have been excluded. *Edmonson v. Leesville Concrete Co.*, —U.S.—, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); applying principles of *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil trial. An unbiased jury, selected through non-discriminatory processes, and the right to serve on such a jury, is an essential component of securing the "acceptance of the laws by all of the people." *Powers v. Ohio*, —U.S.—, 111 S.Ct. 1364, 1369 (1991); see also *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992), holding exclusion of venireperson on basis of sex violative of equal protection.

There is a limit to the scope of legitimate power of every government in the United States. That limit is the consent of the governed. It does not detract from the dignity or integrity of tribal governments to be so limited. To be sure, it may limit a tribe's aspiration to power. However, Congress imposed such limits and they cannot be ignored to the detriment of nonmembers' rights. Limited to their members and nonmembers on tribal-property, much work of governing remains for tribal governments. There remains much that the United States will yet support in developing tribal institutions and cultures. But this need not, and constitutionally cannot, entail the destruction of nonmembers' rights.

CONCLUSION

Amici therefore urge the Court to affirm the lower court's decision by establishing the rule that tribes cannot exercise sovereign power over nonmembers except when the nonmember, through a knowing, overt act, such as accessing tribal property over which the tribe retains the power of exclusion, has consented to such extra-constitutional power.

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